Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

Treasury Decisions

19 CFR Part 12

(T.D. 90-50)

RIN 1515-AA86

CUSTOMS REGULATION AMENDMENT TO THE DEFINITION OF SWITCHBLADE KNIVES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations relating to switchblade knives. Switchblade knives are prohibited entry into the United States by the Switchblade Knife Act. This document clarifies the definition of switchblade knives and related materials which are included within the prohibitions of the Act. The amendment also includes "Balisong" and "ballistic" knives among the prohibited weapons. The Customs position that Balisong knives are included within the legislative intent and current regulatory prohibition has been upheld by the courts and Customs has decided to clarify its position by amending the regulations. Inclusion of "ballistic" knives reflects direct Congressional action. Notice of the Proposed Rulemaking was published in the Federal Register. The comment period was extended to insure that interested individuals had an adequate opportunity to submit comments. The comments received have been reviewed and have been considered in development of this final rule.

EFFECTIVE DATE: August 9, 1990.

FOR FURTHER INFORMATION CONTACT: Samuel Orandle, Value, Special Programs and Admissibility Branch, Commercial Rulings Division (202) 566-5765.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Switchblade Knife Act (15 U.S.C. 1241-1245) (the Act) prohibits the introduction, manufacture, transportation or introduction into interstate commerce of any switchblade knife. To implement the

law, Customs adopted regulations which followed the legislative language extremely closely (19 CFR 12.95–12.103).

As a result of Congressional action and recent court decisions which upheld the long-standing Customs position on the scope of the legislative prohibition, a decision was made to amend the regulations so that they would more closely reflect the legislative prohibition and judicial decisions. A Notice of Proposed Rulemaking was published in the Federal Register on August 18, 1989 (54 FR 34186). Because some organizations requested an extension of time to allow their members an opportunity to send comments, a document was published in the Federal Register on October 27, 1989 (54 FR 43826) extending the comment period to December 17, 1989. The comments which were received have been analyzed and considered in the development of these final regulations.

Analysis of Comments

Comments were received from 62 different sources. Several comments were written in the apparent belief that Customs was imposing restrictions on switchblade knives on its own initiative and not in response to Congressional direction. Because the regulations are based on the legislative mandate, a consideration of the propriety of such regulations is unnecessary. Many other comments were identical in content and different only in the signature block, but nevertheless were considered before adopting this final rule.

Comment:

Thirty-four comments objected to the use of the phrase "but not limited to" in the definition of "switchblade knife" (§ 12.95(a)(1)). Apparently, this phrase was interpreted as an attempt by Customs to extend the legislative prohibition against switchblade knives to all knives. This was not Customs intent. Customs has no desire to limit the importation of knives and knife parts, so long as those articles are not prohibited by the Switchblade Knife Act. The phrase was used in the proposed regulation to indicate that the prohibition of the act extended to knives marketed under various names. Because the regulation could not include every possible name under which a knife prohibited by the act might be marketed, Customs did not want it to appear that the definition was intended to be an all-inclusive listing of prohibited knives. To avoid the confusion, the regulatory language has been modified to indicate that the prohibition applies to the class of knives which are sometimes referred to as "switchblade, Balisong, butterfly, gravity or ballistic" and have the characteristics or identities which are described in remaining portions of the regulation.

Comment:

Seventeen comments objected to Customs including Balisong knives, butterfly knives, gravity knives and parts for these knives within the definition of "switchblade knife". The commenters stated

that the inclusion of these articles was an improper expansion of the Switchblade Knife Act.

Response:

Customs has consistently maintained that the Congressional intent in enacting the Switchblade Knife Act was to prohibit the importation and interstate transportation of all types of knives which shared the characteristics of concealability and the ability to be quickly and easily converted into a weapon. This position has been upheld in judicial decisions (see *Taylor* v. *U.S.*, 848 F.2d 715 (6th Cir. 1988)). By expressly including identifiable categories of prohibited knives, as well as providing notice that the prohibition extends to parts and unassembled knives, Customs is clarifying its position for the public, not expanding the scope of the Act.

Comment:

Four comments objected to the proposed amendment (and, in effect, to the underlying Switchblade Knife Act itself) as being ineffective in fighting crime, under the theory that most criminals seeking a weapon will still be able to find one or use a kitchen knife or even a sharpened piece of metal.

Response:

Customs believes that these comments are beyond the scope of the amendment.

Comment:

Seven comments were received from persons in the cutlery manufacturing or repair business which expressed concern that the amendment would impair their ability to import knife parts and thus adversely affect their businesses.

Response:

The amendments to the regulations will have no impact on the ability of businesses or persons to import any knives or knife replacement parts which are not prohibited by the Switchblade Knife Act.

Comment:

Two comments expressed concern that Customs might prohibit the importation of all folding knives.

Response:

Customs will not prohibit the importation of ordinary folding knives designed for utilitarian purposes.

Determination

After consideration of all the comments received in response to publication of the notice of proposed rulemaking, and further review of the matter, it has been determined to adopt the regulations in final form with the modifications discussed.

Regulatory Flexibility Act

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.),* it is certified that the amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

Executive Order 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

Drafting Information

The principal author of this document was Peter T. Lynch, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

List of Subjects in 19 CFR Part 12

Customs duties and inspections, Imports, Switchblade knives.

Amendment to the Regulations

Part 12, Customs Regulations (19 CFR Part 12), is amended as set forth below:

PART 12—SPECIAL CLASSES OF MERCHANDISE

1. The general authority citation for Part 12 will continue to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States (HTSUS)), 1624.

2. The specific authority for §§ 12.95–12.103 is revised to read as follows:

§§ 12.95–12.103 also issued under 15 U.S.C. 1241–1245.

3. Section 12.95 is amended by revising paragraph (a) to read as follows:

§ 12.95 Definitions.

* * * * * * *

(a) *Switchblade knife.* "Switchblade knife" means any imported knife, or components thereof, or any class of imported knife, including "switchblade", Balisong", "butterfly", "gravity" or "ballistic" knives, which has one or more of the following characteristics or identities:

(1) A blade which opens automatically by hand pressure applied to a button or device in the handle of the knife, or any knife with a blade which opens automatically by operation of inertia, gravity, or both;

(2) Knives which, by insignificant preliminary preparation, as described in paragraph (b) of this section, can be altered or converted so as to open automatically by hand pressure applied to a button or device in the handle of the knife or by operation of inertia, gravity, or both;

(3) Unassembled knife kits or knife handles without blades which, when fully assembled with added blades, springs, or other parts, are knives which open automatically by hand pressure applied to a button or device in the handle of the knife or by operation of inertia, gravity, or both; or

(4) Knives with a detachable blade that is propelled by a spring-operated mechanism, and components thereof.

* * * * * * *

§ 12.96 [Amended]

4. In § 12.96(b) remove the words "the Act of August 12, 1958 (15 U.S.C. 1241–1244)" and add, in their place the words "15 U.S.C. 1241–1245".

5. Section 12.97 is revised to read as follows:

§ 12.97 Importations contrary to law.

Importations of switchblade knives, except as permitted by 15 U.S.C. 1244, are importations contrary to law and are subject to forfeiture under 19 U.S.C. 1595a(c).

6. Section 12.98 is amended by revising the introductory text and revising paragraph (c) to read as follows:

§ 12.98 Importations permitted by statutory exceptions.

The importation of switchblade knives is permitted by 15 U.S.C. 1244, when:

* * * * * * *

(c) A switchblade knife, other than a ballistic knife, having a blade not exceeding 3 inches in length is in the possession of and is being transported on the person of an individual who has only one arm.

§ 12.100 [Amended]

7. In § 12.100(b) remove the words "section 4 of the Act of August 12, 1958".

§ 12.101 [Amended]

8. In § 12.101(a) remove the words "section 545, title 18, United States Code" and add, in their place, the words "19 U.S.C. 1595(c)".

§ 12.103 [Amended]

9. In § 12.103 remove the words "the Act of August 12, 1958 (15 U.S.C. 1241–1244)" and add, in their place, the words "15 U.S.C. 1241–1245".

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: July 3, 1990.
PETER K. NUNEZ,
Assistant Secretary of the Treasury.

[Published in the Federal Register, July 10, 1990 (55 FR 28191)]

19 CFR Parts 11, 134, 158, and 159

(T.D. 90–51)

COUNTRY OF ORIGIN MARKING; CONFORMING AMENDMENTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: In accordance with Customs policy of periodically reviewing its regulations to ensure that they are current, this document makes certain conforming changes which are necessary because of certain provisions of the Trade and Tariff Act of 1984. The changes merely conform citations in the regulations to existing law.

EFFECTIVE DATE: July 10, 1990.

FOR FURTHER INFORMATION CONTACT: Lorrie Rodbart, Commercial Rulings Division (202) 566–2938.

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of a continuing program to keep its regulations current, the Customs Service has determined that certain legislative actions require conforming amendments to the Customs Regulations contained in Chapter I, Title 19, Code of Federal Regulations (19 CFR Chapter I).

Section 207 of Pub. L. 98–573, the Trade and Tariff Act of 1984, amended § 304, Tariff Act of 1930, as amended (19 U.S.C. 1304), to add new paragraphs (c), (d), and (e), and redesignated existing paragraphs (c), (d), and (e) as (f), (g), and (h), respectively. This document reflects these latter changes by amending certain sections of Parts 11, 134, 158, and 159, Customs Regulations, (19 CFR Parts 11, 134, 158, and 159), which refer to § 304(c), (d) and (e). These con-

forming amendments to the regulations remove references to § 304(c), 304(d), and 304(e), and replace them with § 304(f), 304(g), and 304(h), as appropriate.

INAPPLICABILITY OF PUBLIC NOTICE AND
DELAYED EFFECTIVE DATE PROVISIONS

Since these amendments are nonsubstantive changes which merely conform the Customs Regulations to existing law or practice, pursuant to 5 U.S.C. 553(b)(3)(B), notice and public procedure thereon are unnecessary and pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

EXECUTIVE ORDER 12291

Because this document will not result in a "major rule" as defined by section 1(b) of E.O. 12291, the regulatory analysis and review prescribed by the E.O. is not required.

INAPPLICABILITY OF REGULATORY FLEXIBILITY ACT

This document is not subject to the provisions of sections 603 and 604 of Title 5, United States Code, the "Regulatory Flexibility Act." That Act does not apply to any regulation, such as this, for which a notice of proposed rulemaking is not required by the Administrative Procedure Act (5 U.S.C. 551, *et seq.)* or any other statute.

DRAFTING INFORMATION

The principal author of this document was Earl Martin, Regulations and Disclosure Law Branch, Office of Regulations and Rulings. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PARTS 11, 134, 158, AND 159

Customs duties and inspection; Marking

AMENDMENTS TO THE REGULATIONS

Accordingly, Parts 11, 134, 158, and 159, of the Customs Regulations (19 CFR Parts 11, 134, 158, and 159) are amended as set forth below:

PART 11—PACKING AND STAMPING; MARKING

1. The authority citation for Part 11 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1624, General Note 9, Harmonized Tariff Schedule of the United States.

§ 11.9 [Amended]

2. In § 11.9(a) remove the citation "Section 304(c), Tariff Act of 1930, as amended" and add, in its place, "19 U.S.C. 1304(f)".

PART 134—COUNTRY OF ORIGIN MARKING

1. The authority citation for Part 134 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General Note 8, Harmonized Tariff Schedule of the United States), 1304, 1624.

§ 134.2 [Amended]

2. In § 134.2 remove the citation "paragraph (c) of section 304, Tariff Act of 1930, as amended (19 U.S.C. 1304(c))" and add, in its place, "19 U.S.C. 1304(f))".

§ 134.3 [Amended]

3. In § 134.3(a) remove the citation "19 U.S.C. 1304(c)" and add, in its place, "19 U.S.C. 1304(f)".

§ 134.4 [Amended]

4. In § 134.4 remove the citation "section 304(e), Tariff Act of 1930, as amended (19 U.S.C. 1304(e))" and add, in its place, 19 U.S.C. 1304(h)".

§ 134.53 [Amended]

5. In § 134.53(a)(2) in the first sentence, remove the citation "19 U.S.C. 1304(c)" and add, in its place, "19 U.S.C. 1304(f)". In the last sentence, remove the citation "19 U.S.C. 1304(c) and (d)" and add, in its place, "19 U.S.C. 1304(f) and (g)".

§ 134.54 [Amended]

6. In § 134.54(c) remove the citation "section 304(c) of the Tariff Act of 1930, as amended (19 U.S.C. 1304(c))" and add, in its place, "19 U.S.C. 1304(f)".

PART 158—RELIEF FROM DUTIES ON MERCHANDISE LOST, DAMAGED, ABANDONED, OR EXPORTED

1. The authority citation for Part 158 continues to read as follows:

Authority: 19 U.S.C. 66, 1624, Subpart C also issued under 19 U.S.C. 1563, unless otherwise noted.

§ 158.45 [Amended]

2. In § 158.45(d) remove the citation "section 304(c), Tariff Act of 1930, as amended (19 U.S.C. 1304(c))" and add, in its place, "section 304(f), Tariff Act of 1930, as amended (19 U.S.C. 1304(f))".

PART 159—LIQUIDATION OF DUTIES

1. The authority citation for Part 159 continues to read as follows:

Authority: 19 U.S.C. 66, 1500, 1624. Subpart C also issued under 31 U.S.C. 372. Additional authority and statutes interpreted or applied are cited in the text or following the sections affected.

§ 159.46 [Amended]

2. In § 159.46(a) remove the citation "section 304(c), Tariff Act of 1930, as amended (19 U.S.C. 1304(c)" and add, in its place, "section 304(f), Tariff Act of 1930, as amended (19 U.S.C. 1304(f))".

MICHAEL H. LANE,
Acting Commissioner of Customs.

Approved: June 19, 1990.
JOHN P. SIMPSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, July 10, 1990 (55 FR 28190)]

U.S. Court of Appeals for the Federal Circuit

INTREPID, PLAINTIFF-APPELLANT *v.* MAMIE E. POLLOCK, DISTRICT DIRECTOR OF CUSTOMS, AND UNITED STATES, DEFENDANTS-APPELLEES

Appeal No. 89–1468

(Decided June 29, 1990)

Dickson R. Loos, Holland & Knight, of Washington, D.C., argued for plaintiff-appellant. With him on the brief was *William G. Bell*, Holland & Knight, of Miami, Florida.

Velta A. Melnbrencis, Assistant Director, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for defendants-appellees. With her on the brief were *Stuart E. Schiffer*, Acting Assistant Attorney General and *David M. Cohen*, Director. Also on the brief were *Wendell L. Willkie, II*, General Counsel, *Stephen J. Powell*, Chief Counsel for Import Administration and *Tanya J. Potter*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Washington, D.C., of counsel.

Appealed from: U.S. Court of International Trade.
Judge TSOUCALAS.

Before NIES, *Chief Judge*, SMITH, *Senior Circuit Judge*, and NEWMAN, *Circuit Judge*.

NIES, *Chief Judge*.

Intrepid appeals from the order of the United States Court of International Trade in *Intrepid* v. *Pollock*, 712 F. Supp. 212 (Ct. Int'l Trade 1989) (Tsoucalas, J.), denying its motions under 15(a) and (d) of the Rules of the Court of International Trade for leave to supplement and amend its complaint, and dismissing its action *sua sponte*. We reverse the rulings on the motions, vacate the judgment, and remand for proceedings on the merits.

I

Intrepid imported certain welded steel pipes (BS–1387) from Thailand into Puerto Rico between July 1987 and February 1988. Although not originally required on the July shipment, the International Trade Administration of the Department of Commerce (ITA) subsequently directed the United States Customs Service to suspend liquidation and to obtain cash deposits for estimated duties on such imports, pursuant to certain outstanding ITA antidumping and

countervailing duty orders.[1] In February 1988, Intrepid made a request to the ITA for exclusion of its steel pipes from the scope of the antidumping duty order.

Before a ruling was made on its request to ITA, Intrepid commenced suit in the Court of International Trade on April 12, 1988, against the District Director of Customs and the United States asserting that the BS–1387 pipe was not within the scope of the outstanding orders; that the original orders did not adequately describe the class of investigated merchandise; that it had costed the merchandise on the basis of entry without duties which had not been required in July; and that it would be irreparably harmed if it had to deposit cash pending liquidation. Asserting jurisdiction under 28 U.S.C. § 1581(i) (1988), it sought to enjoin Customs from collecting cash deposits, as opposed to requiring a bond, for estimated duties pertaining to the imported steel pipes and such other relief as was just. Its motion for a temporary restraining order and a preliminary injunction was denied on April 15, 1988.

In early January 1989, the court requested a status report from the parties. The government responded that in the interim Customs did permit Intrepid to post a bond, rather than to deposit cash, covering the estimated duties and suggested that Intrepid's complaint should be dismissed because it had obtained all the relief it had sought in its complaint.

Meanwhile, on January 19, 1989, in response to Intrepid's pending request, the ITA ruled that the steel pipes Intrepid imported were within the scope of the outstanding antidumping duty order. A facsimile copy of that determination was received by Intrepid on January 23, 1989, whereupon, on February 2, 1989, within the time to appeal that determination, Intrepid moved to file an amended complaint (February complaint). The February complaint included allegations specifically directed to ITA's scope determination and sought to prohibit "[d]efendants from liquidating the subject entries pending appeal of the ITA determination." The court denied a motion for injunctive relief *pendente lite* and reserved ruling on the motion to amend.

Also in response to ITA's scope determination, Intrepid attempted to file an "administrative appeal" to the Secretary of Commerce, and was advised on March 10, 1989, that no such procedure existed. After offering amendments to the still-pending motion to file the February complaint, on May 1, 1989, Intrepid sought to substitute a second amended complaint (May complaint) as a replacement for all earlier pleadings. This pleading was the first to include all technical allegations against the ITA's scope determination including specifically naming ITA in the caption and alleging jurisdiction under 28 U.S.C. § 1581(c) (1988). The government opposed, contending that

[1] *Antidumping Duty Order; Circular Welded Carbon Steel Pipes and Tubes From Thailand*, 51 Fed. Reg. 8341 (Mar. 11, 1986). This order covers the same pipes and tubes as the *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Certain Circular Welded Carbon Steel Pipes and Tubes From Thailand*, 50 Fed. Reg. 32,751 (Aug. 14, 1985).

Intrepid could not amend its originally filed complaint to obtain review of ITA's scope determination but had to have filed a separate complaint within 30 days of that determination.

The trial court agreed with the government and dismissed the pending action *sua sponte*. As bases for its dismissal, the court stated that: (a) Intrepid's complaint as filed had been mooted by Customs' action in allowing Intrepid to post a bond; (b) Intrepid's complaint, filed nine months *before* notification of ITA's scope determination, could not cover ITA's scope determination because it was not filed within the time period specified in section 19 U.S.C. § 1516a(a)(2) (1988), *i.e.*, within 30 days *after* ITA's determination; (c) the February complaint was deficient; and (d) the May complaint which was correct in all respects was too late to meet the statutory time period. The court deemed Intrepid responsible for the harsh consequence of dismissal because it chose not to follow the statutory scheme of filing a *separate* complaint. In its discussion, the court found it significant that the jurisdictional allegation of the original complaint was 28 U.S.C. § 1581(i) whereas a complaint for review of a scope determination fell under 28 U.S.C. § 1581(c).

II

Rule 15 of the Court of International Trade which parallels that of the Federal Rules of Civil Procedure, provides in pertinent part:

> **Rule 15. Amended and Supplemental Pleadings.**
>
> **(a) Amendments.** A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been noticed for trial, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires * * *.
>
> * * * * * * *
>
> **(c) Relation Back of Amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment, that party (1) has received such notice of the institution of the action that [he] the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party. The delivery or mailing of the summons and complaint to the Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Department

> of Justice, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.
>
> **(d) Supplemental Pleadings.** Upon motion of a party, the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleadings setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statements of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

The Supreme Court, in an early ruling on the Federal Rules of Civil Procedure, stated that: "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley* v. *Gibson*, 355 U.S. 41, 48 (1957) (involving the sufficiency of pleadings to give notice). In *Foman* v. *Davis*, 371 U.S. 178 (1962), the Court re-emphasized its view in the context of Rule 15, wherein it held that an appellate court erred in affirming a district court's denial of a motion to vacate a judgment of dismissal for purposes of supplementing and amending a complaint to state an alternative theory for recovery. In so doing it stated that the "mandate" of Rule 15(a), which declares that leave to amend " 'shall be freely given when justice so requires,' " "is to be heeded." 371 U.S. at 182. The Court has consistently adhered to that view although it has repeatedly reminded that a trial court is required to take into account any prejudice to the opposing party which would result from allowing the amendment of the pleadings. *See, e.g., Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. at 330–31 (substantial prejudice found); *United States* v. *Hougham*, 364 U.S. 310, 316–17 (1960) (no prejudice found). The Court expounded on that and other considerations in *Foman* stating:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given."

371 U.S. at 182.

An appeal from the denial of a motion to file an amended or supplemental pleading invokes an abuse of discretion standard of review. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. at 330 ("It is settled that the grant of leave to amend the pleadings * * * is within the discretion of the trial court."). Notably absent from the court's opinion here, however, is any indication that the court was making a *discretionary* decision, in the sense that the court weighed considerations such as undue delay, prejudice to the opposing party and the like. Rather, the court rejected Intrepid's motions based on its conclusions that the various supplemental and amended pleadings were either too early or too late, or proffered impermissible changes. However, a misinterpretation of the Rule itself would constitute an abuse of discretion. *Kingsdown Medical Consultants, Ltd.* v. *Hollister, Inc.*, 863 F.2d 867, 876, 9 USPQ2d 1384, 1392 (Fed. Cir. 1988), *cert. denied,* 109 S. Ct. 2068 (1989). We conclude that none of the grounds, relied on by the court or any other urged by the government, provides a legally sound basis for denial of Intrepid's Rule 15 motions, and that such denial was, accordingly, an abuse of discretion.

A

The trial court reasoned that Intrepid's *original* complaint could not have challenged the ITA's scope determination because it filed nine months *before* the ruling was made. However, that the count could not have been made in the original complaint is not a ground for refusing an amended or supplemental complaint. Rule 15(d) unequivocally allows supplementing a complaint with a count based on later events. Where the supplemental pleading with respect to such later events relates to the same cause of action originally pleaded, the Supreme court held, in *Griffin* v. *School Board,* 377 U.S. 218, 227 (1964), that it would be an abuse of discretion to deny the amendment. There the Court specifically stated that Fed. R. Civ. P. 15(d) "plainly permits supplemental amendments to cover events happening after suit, and * * * persons participating in these new events may be added if necessary." In *Griffin,* the original complaint had challenged racial segregation in public schools. The amended or supplemental pleadings added new parties and relied on transactions, occurrences, and events which had happened since the action had begun. The Court explained that the amended complaint was not a new cause of action but merely part of the same old cause of action arising out of the continued desire of black students in Price Edward County to have the same opportunity for state-supported education afforded white people. Similarly, a complaint may be amended where a new form of relief is being sought. *See, e.g., Foman,* 371 U.S. at 182; *United States* v. *Hougham,* 364 U.S. at 316–17.

Here, the motions to amend and supplement the pleadings pertain to an event (the ITA's scope determination) happening after suit. The government would have us believe that Intrepid's only objective in originally filing suit was to be relieved from the requirement for cash deposits covering estimated antidumping and countervailing duties upon its entries of pipes from Thailand. We disagree. Intrepid's averments in its original complaint specifically alleged that it particular kind of "imported pipe is not within the class or kind of merchandise" covered by the ITA's investigation and the resulting antidumping and countervailing duty orders. The later events are directly related to those averments which, indeed, were the basis for the particular relief sought *at that time*. The relief now sought matured because of subsequent events but is based on the same duty orders that prompted the complaint to be filed. Though admittedly the count is different from that in the original complaint, the supplemental and amended pleadings, under the *Griffin* analysis, are part of the same claim arising out of the government's acts of subjecting Intrepid's pipe to the outstanding antidumping and countervailing duty orders. Thus, it is permitted under Rule 15(d). *See also LaSalvia* v. *United Dairymen of Arizona*, 804 F.2d 1113 (9th Cir. 1986), *cert. denied*, 482 U.S. 928 (1987); *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982).

B

Similarly, we do not agree that Intrepid's efforts to supplement the pleadings to cover the ITA's scope determination were too late. Allegations that the ITA improperly ruled on the scope determination first appeared in the timely February complaint well within the 30-day period for challenging ITA's decision. That those allegations were *imperfect* is not fatal to their meeting the statute of limitations. The deficiencies were corrected by the subsequent amendment which, under the provisions of Rule 15(c), relate back to the timely date of February 2, 1989. In *Tiller* v. *Atlantic Coast Line R.R.*, 323 U.S. 574, 581 (1945), the Supreme Court held that: "There is no reason to apply a statute of limitations when, as here, the respondent has had notice from the beginning that petitioner was trying to enforce a claim against it * * *." That statement recognizes the interrelationship between a statute of limitations and Rule 15(c).

In *Snoqualmie Tribe of Indians* v. *United States*, 372 F.2d 951, 960 (Ct. Cl. 1967), the Court of Claims further explained that interrelationship, holding:

> A primary purpose of statutes of limitations is 'to ensure that parties are given formal and seasonable notice that a claim is being asserted against them;' it may be said of [Rule 15(c)[2]] that it 'is based on the idea that a party who is notified of litigation concerning a given transaction or occurrence is entitled to no more protection from statutes of limitations than one who is informed of the precise legal description of the rights sought to be enforced.' Thus notice is the test, and it is built-into the rule's requirement that the amended pleading arise out of the same 'conduct, transaction, or occurrence.' In other words, the inquiry in a determination of whether a claim should relate back will focus on the notice given by the general fact situation set forth in the original pleading.

372 F.2d at 960 (cite and footnote omitted); *see also Vann* v. *United States,* 420 F.2d 968, 974 (Ct. Cl. 1970) (test for "conduct, transaction, or occurrence" in Rule 15(c) is whether the general fact situation or the aggregate of the operative facts underlying the claim for relief in the first petition gave notice to the government of the new matter). We agree with Intrepid that, at the time of the February complaint, the government was on notice that Intrepid sought to contest the ITA's scope ruling. We disagree with the trial court and the government that the statute of limitations would have to be "tolled" to accept Intrepid's amended pleadings to the February complaint. All that is required is a straightforward application of Rule 15(c) and settled caselaw, of which Intrepid was deprived.

The government argues that the proposed amendments would completely restructure the original action including the allegation of the jurisdictional basis which provides for review of a scope determination. Again, we do not agree that these facts preclude an amendment to add the correct jurisdictional statement to the February complaint. *See International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.,* 121 F.2d 561 (8th Cir. 1941) (Plaintiffs permitted to change entire jurisdictional basis from inapplicable Sherman Act to diversity of citizenship after *dismissal* of the first complaint).

C

Finally, we do not agree that the basic underlying dispute between Intrepid and the government has become moot, and, therefore, the complaint must be dismissed because of the absence of a "case" or "controversy," as required by Article III of the Constitution. *Allen* v. *Wright,* 468 U.S. 737 (1984). The "controversy" requirement has been described by the Supreme Court in *Aetna Life Ins. Co.* v. *Haworth,* 300 U.S. 227 (1937) as follows:

[2] The Indian Claims Commission had a rule 13(c), which as the opinion points out, is identical to rule 22(c) of the Rules of the Claims Court and rule 15(c) of the Federal Rules of Civil Procedure. *Snoqualmie Tribe of Indians* v. *United States,* 371 F.2d 951, 960 (Ct. Cl. 1967).

> A justifiable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

300 U.S. at 240–41 (cases omitted). Mootness of an action relates to the basic dispute between the parties, not merely the relief requested. Thus, although subsequent acts may moot a request for particular relief or a count, the constitutional requirement of a case or controversy may be supplied by the availability of other relief. *Powell* v. *McCormack*, 395 U.S. 486, 496–97 (1969) (the mootness of Powell's claim for injunctive relief related to his seating in Congress held not to moot the case because his claim for back salary remained a viable issue); *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 353 (1922) (suit to restrain contract violation held not mooted with the contract's expiration if there is also a request for damages that is capable of ascertainment). As indicated, there remains a "definite and concrete" controversy between Intrepid and the government concerning the scope of the antidumping and countervailing duty orders which has existed since the inception of Intrepid's suit, continues to exist, and is capable of relief. That the government's action removed the need for the injunctive relief originally requested did not moot the entire action.

III

Conclusion

The government here failed to put forth any of the "apparent or declared reason[s]," such as bad faith or deleteriousness, identified in *Foman*, 371 U.S. at 182, and particularly asserts no substantive prejudice to the government which might justify a denial of Intrepid's motions. Under such circumstances, and because we reject the bases on which the trial court relied in its opinion, we hold that the trial court abused its discretion in refusing to allow the supplemental and amended pleadings. Intrepid was not required to commence a new action to obtain review of ITA's scope determination. To impose such a requirement would violate the mandate that Rule 15 must be liberally construed to prevent loss of a claim where justice so requires.[3]

Accordingly, the judgment of the Court of International Trade dismissing Intrepid's complaint is vacated and the case is remanded for further proceedings.

---

[3]The government's argument that the change from Customs to ITA as the named agency of the United States is significant borders on the frivolous. The United States is the party and has been named from the beginning. Nor are we persuaded by the government's argument that a second summons was necessary when the government was already before the court in Intrepid's pending action. *See* Rule 3(d) of the Rules of the Court of International Trade.

IV

Costs

Costs are awarded to Intrepid.

VACATED AND REMANDED

[illegible]

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

James L. Watson
Gregory W. Carman
Jane A. Restani
Dominick L. DiCarlo
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave

Senior Judges

Morgan Ford

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 90–58)

TRENT TUBE DIV., CRUCIBLE MATERIALS CORP.; ARMCO-SPECIALTY STEEL DIV.; DAMASCUS TUBULAR PRODUCTS; ALLEGHENY LUDLUM CORP.; CARPENTER TECHNOLOGY CORP.; AND UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND AVESTA SANDVIK TUBE AB AND AVESTA STAINLESS, INC., DEFENDANT-INTERVENORS

Consolidated Court No. 87–12–01189

[Remanded to ITC.]

(Dated June 20, 1990)

Collier, Shannon, Rill & Scott (*David A. Hartquist, Patrick B. Fazzone, Kathleen Weaver Cannon, Mary T. Staley* and *Nicholas D. Giordano*) for plaintiffs.

Lyn M. Schlitt, General Counsel, *James A. Toupin,* Assistant General Counsel, Office of the General Counsel, United States International Trade Commission (*Timothy M. Reif* and *William T. Kane*) for the defendant.

Freeman, Wasserman & Schneider (*Jack Gumpert Wasserman* and *Patrick C. Reed*) for the defendant-intervenors.

OPINION AND ORDER

CARMAN, *Judge:* Plaintiffs seek review of the final determination of the United States International Trade Commission (hereinafter Commission or ITC) that an industry in the United States is not materially injured by reason of imports of welded stainless steel pipe and tubes from Sweden. *See Stainless Steel Pipes and Tubes from Sweden,* USITC Pub. No. 2033, (Final) (Nov. 1987) (hereinafter ITC Pub. 2033). Notice of the ITC's final determination was published in 52 Fed. Reg. 45,256 (Nov. 25, 1987). Plaintiffs contend that three of the five Commissioners reached this negative determination in a manner which was unsupported by substantial evidence on the record and otherwise not in accordance with law.

BACKGROUND

In October of 1986, the Specialty Tubing Group filed a petition with the Commission and the Department of Commerce (hereinafter Department of Commerce) alleging that the industry in the United States producing welded and seamless stainless steel pipe

and tube was materially injured or threatened with material injury by reason of imports from Sweden sold at less than fair value. While the Commission decided that the domestic industry producing welded stainless steel pipe and tubing was "still suffering material injury," it determined by a 3–2 vote that "there [was] no material injury by reason of [less than fair value] imports of welded pipe and tube from Sweden." ITC Pub. No. 2033 at 17.[1]

CONTENTIONS OF THE PARTIES

Plaintiffs' Contentions:

Plaintiffs make the following contentions:

(1) Chairman Liebeler erred in her determination:

(a) by basing her determination exclusively on the five factor test for determining causation which originated in *Certain Red Raspberries from Canada,* USITC Pub. No. 1707 at 11–19 (Final) (June 1985) (Additional Views of Vice Chairman Liebeler) (hereinafter ITC Pub. 1707);

(b) by failing in her causation analysis to address any of the factors outlined in 19 U.S.C. § 1677;

(c) by failing to provide any explanation for her findings with respect to import penetration, price trends and product homogeneity; and

(d) by premising here pricing analysis on a search for predatory intent.

(2) Vice Chairman Brunsdale erred in her determination:

(a) by basing her negative causation determination on an estimate of elasticity of supply in the domestic welded stainless steel pipe and tube industry that was based on elasticity estimates that were seriously outdated and not demonstrably relevant to the industry under investigation;

(b) by failing to provide an explanation for certain key elements of her negative causation determination;

(c) by failing to address certain factors related to causation outlined in 19 U.S.C. § 1677; and

(d) by identifying the causation standard as a question of whether the imports were a material cause of injury and failing to relate the imports to the indicia of injury suffered by the domestic industry.

(3) Commissioner Rohr erred in his determination:

(a) by identifying the causation standard as whether imports were a material cause of injury;

(b) in his analysis of the volume effect of the imports by failing to relate his causation determination to the indicia of material injury found by the Commission and by failing to address

[1]The Commission determined that seamless and welded stainless steel pipe and tubing were two separate like products. The Commission found that the seamless industry was materially injured by imports of stainless steel pipe and tube from Sweden. This determination was affirmed by *Sandvik AB* v. *United States*, 13 CIT ——, 721 F. Supp. 1322 (1989), *aff'd per curiam*, No. 90–1082 (Fed. Cir. May 17, 1990) (1990 U.S. App. Lexis 7935).

certain indicators of causation that the ITC was required to consider; and

(c) in his analysis of the price effect of the imports concerning import volume;

(d) failing to consider price suppression; and

(e) by dismissing overwhelming evidence of price underselling.

Contentions of Defendant ITC and Defendant-Intervenors:

The ITC and defendant-intervenors contend that the ITC's determination was reasonable, supported by substantial evidence on the record and in accordance with law.

STANDARD OF REVIEW

In reviewing a final injury determination of the ITC, this Court must hold unlawful any determination unsupported by substantial evidence on the record or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1988). Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co.* v. *Labor Board*, 305 U.S. 197, 229 (1938)). When applying the substantial evidence standard "[t]he court may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo* * * *.'" *American Spring Wire Corp.* v. *United States*, 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984) (quoting *Universal Camera*, 340 U.S. at 488), *aff'd sub nom. Armco. Inc.* v. *United States*, 3 Fed. Cir. (T) 123, 760 F.2d 249 (1985).

CHAIRMAN LIEBELER

Five Factor Test:

Plaintiffs contend that Chairman Liebeler erred by basing her determination exclusively on the five factor test and by failing to address any of the factors outlined in 19 U.S.C. § 1677. The Commissioner's five factor test considers (1) import penetration data; (2) high margin of dumping or subsidy; (3) homogeneity of the products; (4) evidence of declining domestic prices; and (5) barriers to entry (foreign supply elasticity). ITC Pub. 2033 at 29–32. In applying the test to the investigation of stainless steel pipes and tubing from Sweden, Chairman Liebeler found: (1) import penetration to be low; (2) a moderate to high margin of dumping; (3) mixed evidence of homogeneity of product; (4) more or less steady domestic prices; and (5) an absence of barriers to foreign entries. *Id.*

Statutory requirements for the Commissioners to consider in making their determinations concerning material injury are set out in 19 U.S.C. § 1677(7)(B) and (C). These sections read in pertinent part as follows:

(B) Volume and consequent impact

In making determinations under sections 1671d(b), 1673b(a), and 1673d(b) of this title, the Commission, in each case—

(i) shall consider—

(I) the volume of imports of the merchandise which is the subject of the investigation,

(II) the effect of imports of that merchandise on prices in the United States for like products, and

(III) the impact of imports of such merchandise on domestic producers of like products, but only in the context of production operations within the United States; and

(ii) may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reasons of imports.

In the notification required under section 1671d(d) or 1673d(d) of this title, as the case may be, the Commission shall explain its analysis of each factor considered under clause (i), and identify each factor considered under clause (ii) and explain in full its relevance to the determination.

(C) Evaluation of relevant factors

For purposes of subparagraph (B)—

(i) Volume

In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.

(ii) Price

In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether—

(I) there has been significant price underselling by the imported merchandise as compared with the price of like products of the United States, and

(II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

(iii) Impact on affected domestic industry

In examining the impact required to be considered under subparagraph (B)(iii), the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to—

> (I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
>
> (II) factors affecting domestic prices,
>
> (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment, and
>
> (IV) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product.
>
> The Commission shall evaluate all relevant economic factors described in this clause within the context of the business cycle and conditions of competition that are distinctive to the affected industry.
>
> * * * * * * *

19 U.S.C. § 1677(7)(B) and (C) (1988).

In her Additional Views, the Chairman stated:

> The statute requires the Commission to examine the volume of imports, the effect of imports on prices, and the general impact of imports on domestic producers. The legislative history provides some guidance for applying these criteria. The [five] factors incorporate both the statutory criteria and the guidance provided by the legislative history. Each of these factors is evaluated in turn.

ITC Pub. 2033 at 28.

In comparing Chairman Liebeler's test with the statute it appears that while some of the requisite factors in section 1677(7)(B) and (C) have been addressed, others have not. For example, concerning section 1677(7)(B), it is obvious that she considered the volume of imports in coming to her conclusion of low import penetration. She also considered the effects of imports on United States prices when she concluded that domestic prices remained more or less steady. As for the impact of imports on domestic producers, that may have been a factor in the Chairman's evaluation of homogeneity of the product.

Turning to the evaluation of relative factors outlined in section 1677(7)(C), plaintiffs contend that factors included in section (iii)—"Impact on affected domestic industry"—were not considered by Chairman Liebeler in reaching her determination. In *Copperweld Corp.* v. *United States,* 12 CIT ——, 682 F. Supp. 552 (1988), plaintiffs contended that Chairman Liebeler substituted the five factor test for the statutory requirements of section 1677(7). The discussion of Chairman Liebeler's five factor test in *Copperweld,* appeared in a footnote to the plurality opinion. The footnote stated that the Chairman found the five factors to be "particularly helpful on the issue of causation." *Copperweld,* 12 CIT at ——, 682 F. Supp at 567. The court determined that these five factors were not substi-

tuted for the factors contained in section 1677 and that it was rational to conclude that the footnote was incidental to the views outlined in the plurality opinion. *Id.* In the instant case, Chairman Liebeler joined in the majority opinion, which found "material injury," but the majority determined that "there [was] no material injury by reason of [less than fair value imports] of welded pipe and tube from Sweden." ITC Pub. No. 2033 at 17. However, each Commissioner discussed causation in his or her separate Additional Views and it is clear that Chairman Liebeler's causation theory was based upon her five factor test.

In *USX Corp.* v. *United States*, the court examined the five factor test as applied by Chairman Liebeler in a situation where she concluded that the existence of (1) relatively high dumping margins, (2) substitutable imported and domestic product and (3) downward pricing trends were "outweighed by the absence of barriers to entry, and the fact that cumulated import penetration [was] very low, which strongly suggest[ed] the absence of unfair price discrimination." 12 CIT ——, 682 F. Supp. 60, 64 (1988). The court examined the absence of barriers to entry and low import volume, concluding that the relationship between import volume and injury was unexplained. The court then looked at the absence of barriers to entry and found that Chairman Liebeler was equating unlawful dumping with a form of unfair price discrimination as set out in *Certain Red Raspberries from Canada*, USITC Pub. 1707, 14–15. *Id.* at 65. *Red Raspberries* was the decision where the Chairman originated her five factor theory and is cited as such in the instant investigation. ITC Pub. 2033 at 27 n.12. The court in *USX* found two flaws in the Chairman's position. First, "this view necessarily makes the intent of a foreign producer the focus of the ITC causation inquiry. Another, but not unrelated flaw, is that this view seems to assume that the purpose of the antidumping statute is to prevent a particular type of 'injury to competition' rather than merely material 'injury to industry.' " *USX*, 12 CIT at ——, 682 F. Supp. at 65. In conclusion the court noted that:

> Thus, contrary to the suggestion in defendants' brief, what occurred in this case is not the mere incorporation of another relevant economic factor into a causation analysis as is clearly permissible under 19 U.S.C. § 1677(7)(B)–(C). Instead, the nature of the reliance on the barrier to entry factor has worked to change the focus of the injury investigation in a manner not permitted by Congress.

USX, 12 CIT at ——, 682 F. Supp. at 68.

After a careful review of the five factors and Chairman Liebeler's application of these factors to the investigation in question, it appears that she has failed to examine the factors outlined in section 1677(7)(C)(iii). It is also unclear whether or not the Chairman considered the impact of the Swedish imports on domestic producers as

set out in section 1677(7)(B)(i)(III). Since these factors have not been examined as they must be to comply with the statute, the Court holds that Chairman Liebeler's determination is not supported by substantial evidence on the record and is not in accordance with law. Therefore, her determination is remanded with instructions to evaluate the investigation in relation to the factors outlined in section 1677(7)(C)(iii) and section 1677(7)(B)(i)(III) and to comply with section 1677(7)(B) by explaining her analysis of each factor considered under clause (i), identifying each factor under clause (ii) and explaining the relevance of any clause (ii) factor.

VICE CHAIRMAN BRUNSDALE

Elasticity Model:

Plaintiffs' main contention is that Vice Chairman Brunsdale based her elasticity model on outdated studies, specifically a study of the iron and steel industry as a whole conducted in the 1970's that contained data going back to the 1950's. Plaintiffs claim that applying this data to the welded and stainless steel pipe industry in 1986 was neither time nor product specific. They also maintain that the use of old data was specifically rejected in two recent cases, *USX* and *Maverick Tube Corp.* v. *United States,* 12 CIT ——, 687 F. Supp. 1569 (1988).

The ITC and defendant-intervenors contend that plaintiffs agreed to the use of the number ten as elasticity estimate of domestic supply. This figure was arrived at based on information obtained by the Commission during its investigation and the figure was set out in a posthearing memorandum from the Office of Economics to the Commission. The memo stated that the "petitioners agreed with this estimate citing low capacity utilization rates for the domestic industry, the virtual absence of alternative markets, and the inability of domestic tubular producing operations to shift toward other products in the short run." Administrative Record Document (hereinafter A.R.) 110 at 6 (Memorandum EC–K–437, Nov. 5, 1987). The memorandum also stated that "the elasticity of domestic supply for stainless steel pipes and tubes was estimated to be highly elastic, at greater than ten." *Id.* The ITC and defendant-intervenors contend that plaintiffs are estopped from raising this issue of the elasticity number since they did not object to it at the administrative level.

In *USX* and *Maverick Tube,* the court examined elasticity estimates and found them to be flawed. *USX,* 12 CIT at ——, 682 F. Supp. at 70; *Maverick Tube,* 12 CIT at ——, 687 F. Supp. at 1575. In discussing the reliability of elasticity estimates in general, the court in *USX* stated:

> As in *Alberta Pork,* [11 CIT 563, 669 F. Supp. 445 (1987)] this court does not require that ITC establish the accuracy of elasticity estimates to a scientific degree of certainty before they may be used, but this does not preclude a requirement that some threshold degree of reliability be established in the record

> if commissioners are to rely almost exclusively on such estimates in fulfilling their statutorily mandated task.

USX, 12 CIT at ——, 682 F. Supp. at 69.

In *USX* and *Maverick Tube*, use of the same elasticity estimate of 3.5 was at issue. The estimate was rejected first in *USX* and then shortly thereafter in *Maverick Tube. Maverick Tube*, 12 CIT at ——, 687 F. Supp. at 1574–75. In these two cases, unlike the instant case, "expert testimony and adversarial participation in the administrative process" did not take place. *Maverick Tube*, 12 CIT at ——, 687 F. Supp. at 1575. The "estimate was applied in this preliminary determination [*Maverick Tube*] without opportunity for the parties to comment or present evidence on its reliability." *Id.*

Plaintiffs contend that the use of old and nonspecific data was the basis of the rejection of Vice Chairman Brunsdale's elasticity estimate in *USX* and *Maverick Tube* and that her estimate in the instant case should be rejected on the same grounds. In those two cases, the court determined there was "no support in th[e] record to establish the reliability of the underlying data compiled decades ago." *Maverick Tube*, 12 CIT at ——, 687 F. Supp. at 1575. The court also noted that the record did not contain evidence that the specific items under investigation were described by the estimates. *Id.*

The ITC contends that the data were neither old nor nonspecific. At oral argument, the ITC stated that the outmoded figure plaintiffs were critical of was not relied on by the Vice Chairman in her determination. The ITC said that the pre-hearing and post-hearing memoranda indicated that nonspecific industry data were not used by the Vice Chairman. Specifically, the ITC pointed to post-hearing memorandum EC–K–437 from which the number ten came. In its post-argument brief, the ITC notes that while a pre-hearing memorandum by the Office of Economics cited to a study by J. David Richardson and John H. Mutti, entitled "Industrial Displacement Through Environmental Controls: The International Competitive Aspects," the post-hearing memorandum made no mention of the study. *See* Defendant's Submission Concerning Elasticity Estimate of Vice Chairman Brunsdale (hereinafter Defendant's Elasticity Submission) at 5–6; A.R. 86 at 2 n.1 (Memorandum EC–K–398, Oct. 9, 1987). Since the Vice Chairman cites only to the post-trial memorandum when discussing the elasticity estimate and since she notes that the estimate of the Office of Economics on which she relies "incorporates comments and evaluations offered by parties in this case" the ITC claims that she relied on only the post-hearing memorandum for her elasticity estimate. Defendant's Elasticity Submission at 5–6; ITC Pub. 2033 at 43 n.6.

The Court holds that Vice Chairman Brunsdale's elasticity estimate was based on substantial evidence and was in accordance with law. Unlike the estimate used in *USX* and *Maverick Tube*, input

was requested and received from the parties involved and the plaintiffs specifically agreed to the use of the elasticity estimate put forth by the Office of Economics. There is no reference to the Richardson and Mutti study in the post-hearing memorandum upon which the Vice Chairman relied. In fact, another figure of 16.24 was discussed and dismissed as inappropriate since "the technique used in estimating [that figure was] somewhat upwardly biased." A.R. 86 at 2 n.1. As to plaintiffs' contentions that the estimate was based on non-specific industry information, the Vice Chairman looked to such factors as the low capacity utilization rate for domestic producers as well as the lack of alternative markets for these producers and their limited ability to switch to manufacturing different products in determining her estimate. ITC Pub. 2033 at 47–48.

In describing the relationship between her negative determination and her elasticity estimate, the Vice Chairman stated that if the elasticity of domestic supply was at least 10, then "if the average domestic price obtained by U.S. producers rises by 1 percent, other things remaining the same, quantity supplied by domestic firms would increase by at least 10 percent." ITC Pub. 2033 at 43. She then applied this relationship between quantity and price to the volume and price in the instant investigation. She stated, "[s]ince domestic shipments were at most 4.3 percent lower [because of Swedish imports] and since the supply elasticity is greater than 10, price suppression/price depression would be, *at most*, 0.43 percent (that is, 4.3 percent divided by 10)." ITC Pub. 2033 at 45 (emphasis in original). The Vice Chairman, therefore related her estimate to a finding of price suppression and price depression as outlined in 19 U.S.C. § 1677(7)(C)(ii)(II). This evidence of price suppression and depression was used along with evidence of the volume of imports to find the maximum possible revenue loss for domestic firms on account of the Swedish imports. ITC Pub. 2033 at 45–46. Revenue loss is a measure of "the impact of imports * * * on domestic producers * * *." as noted in 19 U.S.C. § 1677(7)(B)(i)(III).

During oral argument, plaintiffs contended that the case law established by *USX* and *Maverick Tube* allow for the reevaluation of Vice Chairman Brunsdale's elasticity model, despite the fact that their economist agreed with the estimate at the administrative level. Transcript of Oral Argument at 35–36. The ITC cites *Kokusai Elec. Co., Ltd.* v. *United States*, 10 CIT 166, 171–72, 632 F. Supp. 23, 28 (1986) and *Empire Plow Co., Inc.* v. *United States*, 11 CIT 847, 675 F. Supp. 1348, 1354 (1987) to stand for the proposition that plaintiffs are estopped from reversing their position and raising this issue on appeal. The Court finds that to allow plaintiffs to change their position at this time would deny the Commission the opportunity to review plaintiffs' arguments during the time period prescribed by statute as well as deprive the other parties of their right to respond to plaintiff's position.

Explanation of Analysis:

Plaintiffs further contend that Vice Chairman Brunsdale did not explain her analysis of her negative causation determination. At oral argument, the ITC stated that the Vice Chairman "took a step-by-step approach, calculating maximum loss of shipments, and on the basis of that elasticity of supply figure, calculating the maximum declining price." Transcript of Oral Argument at 56. Defendant-intervenors contend that there were three reasons why it was easy for United States producers to increase their domestic shipments of stainless steel welded pipes and tubes in response to a price increase: low capacity utilization rates were in effect, there was a lack of other available markets, and the producers were unable in the short run to shift to manufacturing products other than stainless steel welded pipes and tubes.

The Vice Chairman's views indicate that she examined "the maximum possible adverse effects on domestic prices and volume" and "considered first the absolute and relative amounts of the subject imports." ITC Pub. 2033 at 42. She then applied the elasticity model after making two assumptions: "[f]irst * * * that the total size of the market was little affected by the lower price of the dumped pipe and tube," and "[s]econd * * * that the total volume of the dumped imports replaces an equal volume of domestic shipments on a one-for-one basis." *Id.* at 44. She then found that the volume effect in 1986 when imports were greatest would have caused a contraction in domestic industry shipments of 4.3 percent and price suppression/price depression of 0.43 at most. *Id.* at 45. Vice Chairman Brunsdale then concluded with her discussion of material injury and lost revenues as outlined below in the Court's discussion of the causation standard.

Based upon her additional views it is apparent to the Court that the Vice Chairman explained her analysis and conclusion that dumped imports of Swedish stainless steel welded pipe and tube were not a cause of material injury to the domestic industry. Her explanation was supported by substantial evidence on the record and was otherwise in accordance with law.

Failure to Consider Statutory Factors:

Plaintiffs contend that Vice Chairman Brunsdale failed to consider the effect of Swedish imports on factors such as industry profits, productivity, return of investment, capacity utilization, cash flow, inventories, employment, wages, growth, ability to raise capital or cash flow and investment levels and trends. Defendant-intervenors note that the Vice Chairman's analysis of these section 1677(7)(C)(iii) factors appears at footnote 66 of the majority opinion under the heading "Condition of the Domestic Industry." ITC Pub. 2033 at 17 n.66. The footnote reads as follows:

> Vice Chairman Brunsdale has severe reservations about the finding that domestic industry is materially injured. She notes, for example, that production, shipments, capacity, number of employees, hours worked, and net sales of the domestic industry were relatively unchanged over the period of investigation. Report at A–31 (Table 2), A–33 (Table 3), A–42 (Table 7), A–52 (Table 12). While the Vice Chairman does not find that the domestic industry is materially injured, she assumes *arguendo* that it is and considers the issue of causation in her Additional Views, *infra.*

Id.

In addition, the majority opinion states that "employment, hours worked, wages paid, and total compensation also declined" during the investigation period. *Id.* at 17.

As the court stated in *Gifford-Hill Cement Co.* v. *United States,*

> First, the Commission is charged only with rationally considering impact on the domestic industry in light of the relevant factors in each case. 19 U.S.C. § 1677(7)(C)(iii)(I) (1982). Second, "the Commission is not required to issue findings and conclusions on an issue concerning a statutory element simply because it was presented by the petitioner." *Jeannette Sheet Glass Corp.* v. *United States,* 9 CIT 154, 607 F. Supp. 123, 130 (1985) [citations omitted]. "Absent a showing to the contrary, the Commission is presumed to have considered all the evidence in the record." *Jeannette,* 607 F. Supp. at 130.

9 CIT 357, 369–70, 615 F. Supp. 577, 587 (1985).

In *Gifford-Hill,* the court reasoned that since data concerning the challenged factors were in the record, " 'the Commission must be presumed to have considered them.' " 9 CIT at 370, 615 F. Supp. at 587 (quoting *Jeannette,* 9 CIT at 162, 607 F. Supp. at 130). In the instant case, the Court holds that data concerning the contested factors were included in the record and it therefore must be presumed that the Commission considered these factors.

Causation Standard:

Plaintiffs further contend that Vice Chairman Brunsdale erroneously identified the causation standard as a question of whether imports were a material cause of injury. The Vice Chairman concluded that the overall combined volume and price effects of the subject imports was 4.7 percent which was too small to be material. ITC Pub. 2033 at 45–46. The paragraph following this conclusion states that "[a] realistic assessment of the degree to which the dumped imports reduced domestic shipments, prices, and industry revenue is smaller than the maximum relative magnitudes presented above. There are three reasons why this is so." *Id.* at 46. At that point, Vice Chairman Brunsdale went on to discuss that: (1) she had ignored the fact that there were other countries that supplied stainless steel welded pipe and tube to the domestic market; (2) she had ignored the fact that domestic and Swedish pipe and tube were not

perfect substitutes for one another; and (3) she had assumed to this point that the price advantage the dumping conferred on the Swedish imports was so large that the entire amount of the Swedish imports could be attributed to the act of dumping. *Id.* at 46–48.

The Vice Chairman then explained that if the full dumping margin of 34.5 percent were passed through to the price of Swedish pipe and tube sold in the domestic market, that price in the United States would be lowered by about 25 percent. She contended, however, it would not have been likely that the Swedish dumping would have produced an adverse effect to the domestic industry of anything near the maximum 4.3 percent volume effect described above. Without the unfair advantage, the resulting decline in imports from Sweden would have been replaced to some extent by imports from other countries and the Swedes would have shipped pipe and tubing to other countries as well. As other countries saw their markets absorbing more Swedish product, these countries would have switched to more attractive markets elsewhere, including more shipments to the United States. Vice Chairman Brunsdale contended that after allowing for the shifting of foreign suppliers, the total amount of pipe and tubing imports coming into the United States would most likely not be very much lower and that even if these imports were lower, they would not fall by the amount of Swedish imports which were diverted from the United States market to other markets. She then concluded that "in order to properly assess the effects of dumped imports from Sweden on domestic firms, it is necessary to allow for the supply responses by other countries if Sweden's imports were removed from the domestic market. When this is done the adverse effect of dumped imports on domestic shipments will be less, possibly considerably less, than 4.3 percent." *Id.* at 50.

The Vice Chairman discussed material injury in terms of lost revenues. Since the Vice Chairman has discretion in making her determination, and the Court finds that her approach was not unreasonable, the Court holds that Vice Chairman Brunsdale's determination was supported by substantial evidence and otherwise in accordance with law.

Imports and Domestic Injury:

Plaintiffs also contend that Vice Chairman Brunsdale failed to relate imports to the indicia of injury suffered by the United States industry. The Vice Chairman's analysis of lost revenue and material injury as outlined above indicates her views on the relationship between imports and injury caused by these imports in the domestic market.

Based upon the foregoing, the Court holds that Vice Chairman Brunsdale's determination, including her use of the elasticity model, was supported by substantial evidence on the record and otherwise in accordance with law.

COMMISSIONER ROHR

Plaintiffs contend that Commissioner Rohr erred in his determination by (a) identifying the causation standard as whether imports were a material cause of injury; (b) failing to relate his causation determination to the indicia of material injury and failing to address certain indicators of causation; (c) coming to an incorrect decision as to import volume; (d) failing to consider price suppression; and (e) dismissing overwhelming evidence of price underselling.

Causation Standard:

Plaintiffs contend that Commissioner Rohr applied an overly burdensome causation standard, namely that he identified the causation standard as a question of whether the imports were a material cause of injury instead of correctly identifying the standard as whether less than fair value imports "are more than a *de minimis* factor in contributing to the injury." *See Maine Potato Council* v. *United States,* 9 CIT 293, 299, 613 F. Supp. 1237, 1243 (1985). Plaintiffs believe a remand instructing the Commissioner to apply the "contributing cause standard" is appropriate. Transcript of Oral Argument at 28.

Plaintiffs base their contention on the following sentence in Commissioner Rohr's Additional Views: "In the final analysis, however, it is neither the volume nor the price effect of imports in the abstract that establishes a causal nexus, but whether they have had a material impact on the performance of the industry." ITC Pub. 2033 at 59. The ITC contends that this argument "contradicts the plain language of Commissioner Rohr's Additional Views and misconstrues the Commissioner's statement in the quoted passage." Defendant's Memorandum in Response to Plaintiffs' Motion for Judgment Upon the Agency Record at 20. Defendant contends that the Commissioner was noting that the volume of the Swedish imports and their price effects should be examined in the context of the performance of the domestic industry when the Commissioner completed the paragraph from which the above sentence was taken by stating:

> Despite increases in both subject import volume and market penetration from 1984 to 1986, the domestic industry has continued to improve. In contrast, while import volume and market penetration have rapidly declined in 1987, the industry's performance has shown signs of weakening. This fact must be relevant to any causation analysis. In a previous steel investigation, the Commission concluded:
>
>> It is our view that, absent other significant evidence of causation, * * * market penetration is insufficient to support a finding of material injury by reason of * * * imports * * * in the context of current conditions facing the domestic * * * industry.

ITC Pub. 2033 at 59 (footnote omitted).

The Court holds that Commissioner Rohr did not apply an overly burdensome causation standard. Plaintiffs contend that the Commissioner was applying a standard of "material cause of injury" instead of the standard "cause of material injury" based upon the Commissioner's use of the words "material impact on the performance of the industry." Based upon his reasoning throughout his determination, it is clear to the Court that the commissioner was applying the correct standard. The steel investigation which the commissioner cited to support his causation determination stated that market penetration alone was not sufficient to support a finding of material injury.

Plaintiffs point to *Maine Potato* where the "Commission stated that LTFV imports were not a 'material cause' of the domestic industry's injury." 9 CIT at 299, 613 F. Supp. at 1243. In the instant determination, Commissioner Rohr found "no causal nexus between the subject imports and the requisite injury" and found "that the LTFV imports of welded stainless steel pipes and tubes from Sweden were not a cause of material injury." ITC Pub. 2033 at 53, 60. As the court in *Maine Potato* stated, this "court will not rely solely on what might be a simple mistake in word usage * * *." 9 CIT at 299, 613 F. Supp. at 1243. The Court's concern is "whether the Commission actually weighed causes and improperly discounted a contributing cause of injury." *Id.*

The Court finds that a contributing cause of injury was not discounted by the Commissioner and holds that Commissioner Rohr's causation standard was supported by substantial evidence on the record and was otherwise in accordance with law.

Relating Causation to Indicia of Injury:

Plaintiffs contend that the Commissioner failed to relate his causation determination to the indicia of material injury and that he failed to address certain indicators of causation. Plaintiffs argue that Commissioner Rohr first analyzed the conditions of the industry and found material injury. In searching for material injury, plaintiffs argue, the Commissioner examined factors such as decreasing sales, decreasing employment, decreasing wages and low capacity utilization. Other factors which were considered indicated that production was improving and that capacity was improving to some extent. Plaintiffs claim that in determining causation, instead of asking whether the injury was a result of the imports, the Commissioner turned the question upside down, stating that since production was increasing and capacity was improving, there was no connection between the imports and the injury.

The ITC contends that the Commissioner explicitly related his analysis of the volume and price effects of the imports to the indicators of the condition of the domestic industry considered by the majority of the Commission. The ITC points out that Commissioner Rohr began his causation analysis by stating that "[c]ausation must

be analyzed specifically in the context of the trends in industry performance during the period of investigation." ITC Pub. 2033 at 54. In addition, the ITC notes that the Commissioner discussed economic indicators such as "improvement in domestic production and production capacity,." *Id.* The ITC points out that the Commissioner stated that "[d]espite increases in both subject import volume and market penetration from 1984 to 1986, the domestic industry has continued to improve." *Id.* at 59.

The Court holds that Commissioner Rohr's causation analysis was supported by substantial evidence on the record and is otherwise in accordance with law. The Commissioner applied the indicia of material injury to his analysis by "examining the role of imports" in the context of industry trends during the period of investigation. He found improvement in domestic production and production capacity, as well as large financial gains in the domestic industry, although a net operating loss was reported by integrated producers. *Id.* at 54.

Plaintiffs further contend that Commissioner Rohr did not address certain indicators of causation. Plaintiffs specifically argue that the following factors were not addressed: "impact of imports on domestic shipments, sales, capacity utilization, employment, productivity, hours worked, wages, total compensation, inventories, ability to raise capital, and investment." Plaintiffs' Memorandum in Support of Their Motion For Judgment Upon the Agency Record at 65. These factors are among those set out in 19 U.S.C. § 1677(7)(C)(iii).

As stated above in the discussion of a similar claim plaintiffs made concerning Vice Chairman Brunsdale, the ITC is charged "only with rationally considering impact on the domestic industry in light of the relevant factors in each case." *Gifford-Hill,* 9 CIT at 369, 615 F. Supp. at 587. In addition, the ITC is not required to issue a finding regarding a statutory requirement "simply because it was presented by the petitioner." *Id.* at 370, 615 F. Supp. at 587 (quoting *Jeannette Sheet Glass,* 9 CIT at 161–62, 607 F. Supp. at 130). In the instant case, the Court holds that data concerning the contested factors were included in the record and it therefore must be presumed that the ITC considered these factors.

Import Volume:

Plaintiffs contend that Commissioner Rohr overlooked three key facts in reaching his negative determination on import volume: (1) the overall trend in imports during the entire period of investigation; (2) the impact of the filing of the petitions and Commerce's subsequent preliminary dumping determination on the level of imports; and (3) the effect of Swedish sales from inventory after mid-1986.

Plaintiffs further contend that the Commissioner erred by not finding a causal nexus between import and injury. Plaintiffs assert that domestic indicators including shipments, employment, wages,

production and capacity utilization declined when imports increased and increased when imports declined.

The ITC contends that the Commissioner did consider the overall trend in imports when he stated:

> However, since the middle of 1986, Swedish imports have declined markedly, and accounted for only 1.5 percent of domestic consumption in the first half of 1987. This decline in imports is consistent with the Avesta's reported change in its market strategy. Thus, while from 1984 to 1986 the volume and market share of the subject imports increased, the industry was showing signs of improvement. In contrast, since the middle of 1986, the Swedish imports have fallen rapidly while the U.S. industry's condition has worsened. These trends do not support a conclusion that the material injury being experienced by the U.S. industry was caused by the subject imports.

ITC Pub. 2033 at 54–55.

As to the filing of the petitions, the ITC contends that the Commissioner observed that the record indicated Avesta's import volume peaked in the first quarter of 1986. The countervailing duty petition was not filed until almost six months after the close of that period, (September 4, 1986), and the petition for the instant investigation was filed more than a month later (October 20, 1986). The ITC adds that the preliminary determination in connection with the instant investigation was issued more than thirteen months after volume began to decline. The Commissioner stated that the decline in imports was consistent with Avesta's change in market strategy. ITC Pub. 2033 at 55.

As to the effect of Swedish sales from inventory after mid-1986, plaintiffs point to a statement in the Dissenting Views of Commissioner Eckes and Commissioner Lodwick on Welded Stainless Steel Pipes and Tubes from Sweden: "[E]ven this strong growth trend understates the expansion in Sweden's market presence in 1986, as the importer sharply drew down his inventories of Swedish material during the year." ITC Pub. 2033 at 63. Defendant-intervenors contend that plaintiffs want the court to reweigh the evidence that the Commissioner considered. According to defendant-intervenors, based on the evidence, the Commissioner found that imports remained relatively low during the entire period in issue, although they did increase from 1984 to mid-1986 and decreased from mid-1986 onward. Defendant-intervenors claim that the record is more than adequate to support Commissioner Rohr's conclusion, regardless of how the Swedish sales from United States inventory are treated.

The Court holds that Commissioner Rohr's determination regarding import volume was based upon substantial evidence on the record and otherwise in accordance with law. It is clear to the Court that the Commissioner considered the volume of imports "in the context of performance of the industry and market conditions dur-

ing the period of investigation." ITC Pub. 2033 at 54. The Commissioner stated that he analyzed the role of imports and import volume in the context of trends in industry performance.

The timing of the petitions in the instant and countervailing duty investigations indicates that these petitions had no effect on import volume. Based on the record as a whole, the determination of Commissioner Rohr was based on substantial evidence and was otherwise in accordance with law.

Price Suppression:

Plaintiffs contend that Commissioner Rohr failed to consider price suppression in his determination. Plaintiffs claim that although the Commissioner examined price trends and found them to be stable, he did not ask whether the flat United States prices were suppressed by import prices. Plaintiffs further claim that the fact that domestic and imported prices had similar or parallel declines during 1985 and 1986 was caused by price suppression.

The ITC contends that the Commissioner must not simply determine whether domestic and imported prices follow similar trends, but must evaluate whether the effect of the imports "otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree." *See* 19 U.S.C. § 1677(7)(C)(ii)(II). The ITC asserts that although Commissioner Rohr took note of the parallel price declines, he also noted the following: (1) "It is particularly telling that the lower price of the imported product did not lead to imports gaining a large share of the U.S. market and U.S. prices remained relatively stable," ITC Pub. 2033 at 57–58; (2) despite lower import prices, the Swedish market share remained small, *Id.* at 54; (3) "Although the price data gave some mixed signals, prices of both the domestic like product and the subject welded stainless steel pipe and tube imports generally remained stable since 1984," *Id.* at 55; (4) "In the only product category for which trend comparisons were possible, prices of the domestic and imported product declined by two percent and three percent, respectively, from the first quarter of 1985 to the fourth quarter of 1986. From the fourth quarter of 1986 to the second quarter of 1987, the price of the domestic product increased by 3 percent while the import price dropped by 3 percent." *Id.*

These divergent trends support the Commissioner's determination of a lack of causal connection between the imports and price suppression or depression. The Court holds that Commissioner Rohr's determination concerning price suppression is supported by substantial evidence on the record and otherwise in accordance with law.

Underselling:

Plaintiffs contend that Commissioner Rohr found that Swedish imports consistently undersold domestic products, but discounted this underselling for reasons which were invalid.

The Commissioner stated the following concerning underselling:

> I have also considered underselling in order to discover possible price effects of the Swedish imports. Swedish imports did consistently undersell the domestic product. *Absent corroboration from other indicators,* such as the changes in market share and price trends discussed above, underselling alone is not a sufficient basis for finding the existence of a causal nexus. Further, given the available data in this investigation, I have given relatively less weight to underselling than to other factors. As I noted in *Argentine Steel:*
>
> > Price comparisons will be better and entitled to greater weight when: (a) there are a greater number of comparisons; (b) the transactions are more representative, i.e., there are many transactions in each comparison, there are uniform conditions, such as geography and purchasers, and there are more nearly identical products being compared.

ITC Pub. 2033 at 56 (footnotes omitted) (emphasis added). The Commissioner gave three reasons for giving limited weight to evidence of underselling: (1) "there were a limited number of price comparisons for any one product category"; (2) "significant differences were found between prices in various geographic regions"; and (3) "although the domestic product and the imported product are relatively fungible within given grades and sizes, there are customer preferences and lead time differences that support a price premium for the domestic good and partially limit the commercial interchangeability of the foreign and domestic products." *Id.* at 56–57. Commissioner Rohr concluded that "when considered within the context of the relatively small volumes of imports from Sweden and relatively stable domestic prices, the underselling in this investigation was insufficient to injuriously impact domestic producers." *Id.* at 59–60.

Plaintiffs contend that "corroboration from other indicators" could be found in the record and that this corroboration included the following factors: (1) low prices of Swedish imports which undersold United States products throughout the investigation period enabled the Swedish producer to gain market share between 1984 and 1986; (2) Swedish imports increased their market penetration from two to approximately four percent of domestic consumption; (3) Swedish producers' consistent underselling practices affected the prices of the domestic product and prevented price increases that would have occurred; and (4) evidence of lost sales. Plaintiffs further contest Commissioner Rohr's reasoning for giving less weight to the underselling data.

In *USX Corp.* v. *United States,* 12 CIT ——, 698 F. Supp. 234 (1988), the court affirmed the ITC's determination in *Argentine Steel* which Commissioner Rohr cited in support of his decision to give less weight to the evidence of underselling in the instant investigation. The court in *USX* noted that "it is within ITC's discretion to make reasonable interpretations of the evidence and to deter-

mine the overall significance of any particular factor in its analysis." 12 CIT at ——, 698 F. Supp. at 239 (citing *Maine Potato*, 9 CIT at 300, 613 F. Supp. at 1244). In discussing Commissioner Rohr's decision to give less weight to the evidence of underselling, the court in *USX* stated it was "reasonable for ITC to give less weight to evidence of underselling when the sample from which the conclusion of underselling is drawn is relatively small." 12 CIT at ——, 698 F. Supp. at 239. In the instant investigation, Commissioner Rohr noted that there were "a limited number of price comparisons for any one product category." ITC Pub. 2033 at 56. In further support of his decision to give less weight to evidence of underselling, Commissioner Rohr cited to the legislative history of the Trade Agreements Act of 1979. *Id.* at 56 n.5; S. Rep. No. 249, 96th Cong., 1st Sess., 88 (1979) ("the significance to be assigned to a particular factor is for the ITC to decide"); *reprinted in* 1979 U.S. Code Cong. & Admin. News, 381, 474; H.R. Rep. No. 317, 96th Cong., 1st Sess. 46 (1979) ("The significance of the various factors * * * will depend upon the facts of each particular case").

In accordance with the considerable discretion with which Congress has vested the ITC as to the weight it will assign a given factor in making its injury determination, the Court holds that Commissioner Rohr's decision to give less weight to evidence of underselling is supported by substantial evidence on the record and otherwise in accordance with law.

Conclusion

As set forth above, a remand of Chairman Liebeler's determination is ordered with instructions to evaluate the investigation in relation to the factors outlined in section 1677(7)(C)(iii) and section 1677(&)(B)(i)(III) and to comply with section 1677(7)(B) by explaining the analysis of each factor considered under clause (i), identifying each factor under clause (ii) and explaining the relevance of any clause (ii) factor.

(Slip Op. 90–59)

718 FIFTH AVENUE CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 85–07–00964

OPINION

[On demand for drawback of duties, judgment for the plaintiff.]

(Decided June 21, 1990)

Rode & Qualey (*Patrick D. Gill* and *Eleanore Kelly-Kobayashi*) for the plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Mark S. Sochaczewsky*) for the defendant.

AQUILINO, *Judge:* This is a case of first impression under same-condition-drawback section 1313(j) of Title 19, U.S.C., which was added to the Tariff Act of 1930 by Pub. L. No. 96–609, § 201, 94 Stat. 3555, 3560 (1980). It arises from import and export of a cushion ruby weighing 18.42 carats and gold ring mounting embellished with pear-shape and round diamonds, together valued at $2,306,750.

I

The unusual background of this case is set forth in *718 Fifth Avenue Corporation* v. *United States*, 7 CIT 195 (1984). The parties have filed herein a stipulation of the facts in lieu of a trial which states, among other things:

> 2. That said merchandise * * * was the subject of entry number 4701–82–606537–1 of May 11, 1982;
>
> 3. That the merchandise was exported from the United States on June 2, 1982, to Geneva, Switzerland, and entered that country;
>
> 4. That the * * * merchandise * * * was reimported under separate consumption entry numbers 4701–84–172280–6 of May 2, 1984, and 4701–84–172321–6 of May 4, 1984, * * * and was exported on June 14, 1984, in the same condition as imported on May 11, 1982, and was not used within the United States before such exportation; * * *
>
> 5. That in anticipation of the exportation on June 14, 1984, plaintiff filed a claim for drawback which became drawback entry 4701–84–750799–9;
>
> 6. That plaintiff's claim for drawback in drawback entry 4701–84–750799–9 was in compliance with all rules and regulations prescribed by the Secretary of Treasury pursuant to 19 U.S.C. § 1313(k);
>
> 7. That on July 22, 1982, plaintiff filed a drawback entry, number 1001–82–714618, pursuant to the provisions of 19 U.S.C. § 1313(j) claiming drawback on the merchandise * * * on the basis of an exportation which took place on June 2, 1982, which claim was subsequently denied;

> 8. That defendant maintains that the earlier drawback claim with respect to the exportation on June 2, 1982, was not in compliance with the rules and interim regulations then in effect. Plaintiff did not present the merchandise to the Customs Service for examination upon exportation nor was any waiver given[.]

The stipulation incorporates (per paragraph 11) "the pleadings and other papers filed in connection with this case". They show that, at the time of first entry on May 11, 1982, the ruby came in duty free but that, after first export to Switzerland on June 2, 1982, the U.S. Customs Service determined that the gem and its mounting should be considered an entirety and classified under TSUS item 740.15 at a duty rate of 9.9% *ad valorem.*[1] This decision led to assessment of $227,947.50 for the ruby in addition to $420.75 originally assessed on the mounting. Those duties have been paid and are now the subject of plaintiff's drawback claim.

The claim has arisen as follows: The plaintiff filed for drawback following the first export. It also requested "internal advice" from Customs as to conditions under which drawback would lie if denied on that first export.[2] The Service ruled that a drawback entry could not be perfected by means of a second exportation, asserting that same-condition drawback applies only to an initial exit. Customs then proceeded to deny drawback on the first export due to lack of prior notice and examination. The plaintiff did not protest that denial; rather, it brought an action challenging the earlier ruling. The Court of International Trade rendered the above-cited decision, concluding that it lacked subject-matter jurisdiction to issue a declaratory judgment in light of the facts and *American Air Parcel Forwarding Co.* v. *United States*, 718 F.2d 1546, 1551–52 (Fed. Cir. 1983). Soon thereafter, on May 2, 1984, the plaintiff re-entered the ruby, duty-free; the mounting was reimported separately on May 4, 1984. To repeat paragraph 4 of the stipulation, *supra*, the merchandise then "was exported on June 14, 1984, in the same condition as imported on May 11, 1982, and was not used within the United States before such exportation".

Subject-matter jurisdication is not at issue in this case, which has been brought pursuant to 28 U.S.C. § 1581(a).

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[1]The plaintiff interposed a protest to this determination which was denied by Customs and which is now the subject of yet another action, CIT No. 84-02-00255.

[2]In particular, the plaintiff asked whether drawback could be had absent prior notice and examination, and if not, whether any or all of three proposed alternatives could be adopted in lieu of prior notice and examination. Those alternatives were that

> (1) the ruby and mounting be returned to the United States for entry under a temporary importation bond for examination by Customs;
>
> (2) the ruby and mounting be returned to the United States under two separate consumption entries, after which they would be examined and exported, same condition drawback being allowed on both the prior and later importations/exportations;
>
> (3) a Customs officer be sent to the present location of the merchandise in Switzerland, at the expense of the claimant, and have the ruby and mounting examined on site.

U.S. Customs Service Internal Advice 215299 B, p. 2 (Feb. 25, 1983). None of them was accepted as "legally viable" by the Service. *Id.*

II

The facts are also not in dispute, and the case thus hinges on the law as applied to them. The starting point, of course, is the governing statute, and courts have held that

> the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

Consumer Product Safety Comm'n v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). *See, e.g., Madison Galleries, Ltd.* v. *United States*, 870 F.2d 627, 629–30 (Fed. Cir. 1989); *Moss Manufacturing Co.* v. *United States*, 13 CIT ——, ——, 714 F. Supp. 1223, 1227 (1989), *aff'd*, 896 F.2d 535 (Fed. Cir. 1990). The pertinent language of 19 U.S.C. § 1313(j) is as follows:

Same condition drawback

> (1) If imported merchandise, on which was paid any duty, tax, or fee imposed under Federal law because of its importation—
>
> (A) is, before the close of the three-year period beginning on the date of importation—
>
> (i) exported in the same condition as when imported, * * * and
>
> (B) is not used within the United States before such exportation * * *;
>
> then upon such exportation * * * 99 per centum of the amount of each such duty, tax, and fee so paid shall be refunded as drawback.

A

Plaintiff's position, according to its complaint [para. thirtieth], is that this statute "permits * * * same condition drawback of the duties paid on an original importation of merchandises so long as the second exportation occurs within three years of the first importation and the other conditions and requirements of the statute and regulations are met". That is, the

> statute does not require that the second exportation prove the first exportation without change; the statute straightforwardly requires only that there be an exportation within the three-year period. The first exportation is irrelevant and obviously is not at issue. What is relevant and is at issue is whether there is an exportation within the three-year period which is the subject of a valid drawback claim against the first importation.[3]

The defendant argues in response:

[3]Brief for Plaintiff, p. 13.

> * * * As Customs Ruling No. 215299B sets out in detail, a second or third exportation of merchandise cannot be "related back" to a first exportation. Each exportation can relate only to the importation immediately preceding it.[4]

It also contends that statutes granting exemption from duties are to be construed strictly, and "any doubts are to be resolved in favor of the Government's construction imposing duty",[5] citing *Swan and Finch Company* v. *United States*, 190 U.S. 143 (1903); *Pelz-Greenstein Co.* v. *United States*, 17 CCPA 305, T.D. 43718 (1929); as well as *Romar Trading Co.* v. *United States*, 27 Cust. Ct. 34, 37, C.D. 1344 (1951) ("The right to recover drawback * * * arises only when all of the provisions of the statute and the applicable and lawful regulations prescribed under its authority have been complied with").

Of course, section 1313(j) does not grant an "exemption" from duties, rather drawback, which the Service defines as "a refund or remission, in whole or in part, of a customs duty * * * lawfully assessed or collected * * *." 19 C.F.R. § 191.2(a). And such a refund or remission is governed by that section, which is clear on its face: When duties are imposed on merchandise upon importation and that merchandise is exported in the ensuing three years in the same condition as imported and without having been used in this country, the importer is entitled to return of 99 percent of the duties paid.

The defendant admits that section 1313(j) "does not specifically restrict attempts to claim drawback by a series of importation/exportation cycles." Defendant's Brief, p. 9. "The statute requires that the merchandise be exported within three years of the date it was imported and in the condition as when imported." *Id.* at 9–10. Nevertheless, Customs tied plaintiff's claim to the first export and thereby effectively reduced the three-year period of limitation adopted by Congress to three weeks.

There is no indication that such a result was intended. In adding subsection (j) to section 313 of the Tariff Act of 1930, Congress specifically addressed the inflexibility of the existing drawback provisions, which only allowed for return of the duties paid "on imported goods upon the exportation of articles manufactured or produced in the United States with the use of the imported goods * * * [or] on imported merchandise exported because the goods do not conform to sample or specifications as ordered, or are shipped to the United States without the consent of the consignee." S. Rep. No. 999, 96th Cong., 2d Sess., p. 23 (1980). Congress expressed dissatisfaction with the scope of the statute, which "provides for drawback in very limited circumstances", and with the alternatives to drawback, which "all have substantial limitations associated with their use." *Id.* It

[4]Defendant's Brief, p. 10.

[5]*Id.* (Footnote omitted).

was thus an intended consequence in extending the drawback law that the law subsection (j)

> would give U.S. firms more flexibility in meeting customer demands, without [their] having to pay nonrefundable duties on merchandise that is not used in the United States. It would be beneficial to U.S. exporters in such ways as * * * giving maximum flexibility * * * in order to meet deadlines or emergency orders. Importers would receive drawback in those instances in which the merchandise imported was not used, and they were unable to anticipate the need to export. such would be the case when the importer discovers that there is little domestic demand for the imported product, that the merchandise cannot be disposed of commercially without financial loss, and that [it] is desirable to return the merchandise to the foreign source or sell it in a foreign country. *Id.* at 24.

This legislative history indicates, as does the resultant enactment itself, that the condition of the merchandise upon exportation and the three-year period were the primary focus of Congress. Its concern as to merchandise condition is reflected, for example, in the provision enacted in 1980 as part of section 1313(j) that the

> performing of incidental operations (including, but not limited to, testing, cleaning, repacking, and inspecting) on the imported merchandise itself, not amounting to manufacture or production for drawback purposes under the preceding provisions of this section, shall not be treated as a use of that merchandise for purposes of applying paragraph (1)(B).[6]

On the other hand, the motives for importing/exporting and the nature of those pursuing them apparently were of little concern. *Cf., e.g.* 16 Cust. Bull. 855, C.S.D. 82–93 (1982); 17 Cust. Bull. 723, C.S.D. 83–1 (1983).

Thus, the court concludes that 19 U.S.C. § 1313(j)(1), in the light of its plain language and underlying legislative history, neither mandates the approach espoused by Customs nor precludes that of the plaintiff.

B

This conclusion does not end the analysis, however, for the decision of the Service in a cade such as this is "presumed to be correct" and the "burden of proving otherwise * * * rest[s] upon the party challenging such decision." 28 U.S.C. § 2639(a)(1). Here, that decision boils down to the point now pressed that, once the merchandise had been exported the first time (in 1982) "without giving Customs the opportunity to examine it, the ruby could not receive the benefit of drawback under 19 U.S.C. § 1313(j), even upon its subsequent reimportation and reexportation." Defendant's Reply Brief, p. 1.

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[6]This subsection, originally numbered (2), is now (4) as a result of provisions added to 19 U.S.C. § 1313(j) by Congress after June 1984, the conclusive moment here.

Of course, at the moment of first export, the plaintiff did not know that any duties were to be assessed on the ruby, nor were "regulations governing the operational functions of same condition drawback"[7] in existence then. In any event, the plaintiff apparently appreciated the problem of lack of prior notice and examination and thereby suggested the alternatives quoted in note 2, *supra*. When they were rejected, and after the decision in *718 Fifth Avenue Corporation* v. *United States*, 7 CIT 195 (1984), the plaintiff reentered the merchandise to accommodate inspection by Customs.

The defendant has now stipulated per paragraph 4, *supra*, that the merchandise "was exported on June 14, 1984, in the same condition as imported on May 11, 1982, and was not used within the United States before such exportation". Moreover, the stipulation [para. 6] states that the exportation "was in compliance with all rules and regulations prescribed by the Secretary of Treasury pursuant to 19 U.S.C. § 1313(k)". In other words, for the purpose of resolving this case, whatever procedural concerns once existed have been satisfied.

> The defendant also argues, however, that the primary reason why plaintiff cannot now claim drawback is that its failure to timely protest Custom's [*sic*] initial determination precludes it forever from contesting that decision, which denied same-condition drawback on the ruby at issue. That decision became final and conclusive on all persons including the United States under 19 U.S.C. § 1514.[8]

There is no dispute that this is true as to the first denial of drawback, but plaintiff's claim for drawback is not based on the first exportation; it is "completely unrelated to the first exportation." Reply Brief for Plaintiff, p. 2. Rather, the plaintiff timely protested the Service's second denial of drawback, which is the basis now of the court's jurisdiction.

III

In view of the foregoing, the court concludes that the plaintiff has successfully borne its burden of persuasion on the points raised, and judgment will therefore enter in its favor for return of the duties, as permitted by law.

[7]U.S. Customs Service Internal Advice 215299 B, p. 1 (Feb. 25, 1983).

[8]Defendant's Reply Brief, p. 1.

(Slip Op. 90-60)

N.A.R., S.p.A., plaintiff v. United States, defendant

Court No. 88-06-00401

Opinion

Plaintiff contests the finding by the Department of Commerce, International Trade Administration ("ITA"), of a dumping margin of 6.39 percent on its U.S. sales of pressure sensitive plastic tape. Plaintiff argues that the ITA should not have made cost adjustments for physical differences between the tape sold in the home market and the tape sold in the U.S. But in the event adjustments are proper, plaintiff contests the use of best information available to determine the adjustments, and the use of another manufacturer's cost data as best information. Further, plaintiff challenges the exclusion of tape rolls less than 50 meters in the determination of foreign market value, and the use of indirect selling expenses in the U.S. as an offset against commissions paid in the home market.

Held: Commerce's decision to make cost adjustments and use best information available is in accordance with law and supported by substantial evidence in the administrative record. However, the Court remands the case to the ITA on the issue of the use of another manufacturer's cost data, since the product used to determine best information available may be too dissimilar for the determination to be in accordance with law. Commerce's exclusion of tape less than 50 meters is affirmed because plaintiff failed to exhaust its administrative remedies. Commerce's use of indirect selling expenses as an offset against commissions is also affirmed.

[Affirmed in part, remanded in part.]

(Decided June 26, 1990)

Siegel, Mandell & Davidson (*Brian S. Goldstein* and *Judith M. Barzilay*); of counsel: *David Newman*, for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Elizabeth C. Seastrum* and *Velta A. Melnbrencis*); of counsel: *Diane McDevitt*, Attorney-Advisor, International Trade Administration, U.S. Department of Commerce, for defendant.

Tsoucalas, *Judge:* Plaintiff, N.A.R., S.p.A. ("NAR"), brings this action pursuant to section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (1988), to contest the final results of an antidumping duty administrative review covering pressure sensitive plastic tape from Italy. The ITA determined therein that an antidumping margin of 6.39 percent existed on NAR's sales of the tape in the United States.[1] The basis for the Court's jurisdiction is 28 U.S.C. § 1581(c) (1988).

Background

NAR is an Italian manufacturer and exporter of pressure sensitive plastic tape to the United States. The ITA's review covers plastic tape manufactured by NAR which entered the United States between October 1, 1985 and September 30, 1986. On October 1, 1986, NAR requested that the ITA conduct an administrative review of an outstanding antidumping duty order for that period.

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[1]The fourth administrative review of Commerce's antidumping duty order was published in the Federal Register on May 9, 1988. *Pressure Sensitive Plastic Tape From Italy; Final Results of Antidumping Duty Administrative Review and Revocation in Part*, 53 Fed. Reg. 16,444 (May 9, 1988).

Before issuing its preliminary determination, the ITA, on November 18, 1986, sent out a questionnaire requesting that NAR indicate, within 45 days, whether any differences existed between the types of merchandise sold in the home market (Italy) or to third countries, and the merchandise sold in the United States. Further, the ITA requested that NAR acknowledge any differences between the cost of manufacturing the merchandise sold in the home market and the cost of manufacturing the merchandise sold in the United States. NAR responded on February 18, 1987, but did not address the question of cost differences. The ITA requested again that NAR provide cost differences, or explain why no cost differences were provided.

NAR's subsequent response noted that "the only difference in the product sold in the home market and the product sold in the U.S. market is the size of the rolls." *NAR Deficiency Response* (July 23, 1987) in *Administrative Record, Public Reel* ("*Public Reel*") at 125. The rolls of tape sold in Italy come in sizes of 66 meters (short) and 990 meters (long), whereas in the United States a short roll is 50 meters and a long roll is 914 meters. NAR again did not specify any cost differences and claimed that this was because their accounting techniques did not provide for such distinctions. *Id.*

The ITA subsequently released the preliminary results of this administrative review. *Pressure Sensitive Plastic Tape From Italy; Preliminary Results of Antidumping Duty Administrative Review and Intent to Revoke in Part,* 53 Fed. Reg. 550 (Jan. 8, 1988). A margin of 2.06 percent was found to exist on NAR's sales of pressure sensitive plastic tape in the United States. *Id.* However, no adjustments were made for cost differences in the manufacture of the differently sized rolls, and the ITA excluded from their calculations all rolls of tape less than 50 meters, the size of the short rolls sold in the U.S. Additionally, in making this computation, the ITA used indirect selling expenses in the U.S. to offset commissions paid in the home market.

Petitioner, Minnesota Mining and Manufacturing Company ("3M"), filed comments based on these results. 3M contended that the ITA's failure to make cost adjustments for differently sized tape rolls distorted the dumping margin in NAR's favor, since the longer tape sold in Italy was cheaper to produce on a per square meter basis than the shorter tape sold in the U.S. The difference is attributable to a cost difference per square meter in the "core cost" and the "slitting cost." As the same size core is used regardless of how much tape is wound around it, the cost declines as the length of the roll increases. The slitting cost of cutting the tape to a particular length. Slitting cost differences are related to additional labor and variable overhead costs as a result of the need for more slitting, resulting in higher costs incurred, to produce the shorter rolls. *3M Comments* (Sept. 14, 1987) in *Public Reel* at 156.

The ITA, in its final determination, chose to make adjustments for these physical differences. 53 Fed. Reg 16,444. A new margin of 6.39 percent was found in NAR's U.S. sales. The increase was attributed to differences found in the cost figures of another Italian tape manufacturer, Manuli, which were used as best information available to adjust for the physical differences.

Plaintiff now contests these results on three major grounds. First, NAR asserts that the increased margin is a result of the ITA's acceptance of 3M's comments, which NAR suggests are not supported by substantial evidence in the administrative record, or otherwise not in accordance with law. NAR questions the need to make cost adjustments for differences in the physical characteristics of the merchandise. Alternatively, if the Court finds there is such a need, NAR questions the use of another manufacturer's cost data as best information available. But, if the use of another manufacturer's cost data is held to be appropriate, NAR asserts that the ITA should have used that manufacturer's most comparable product in making antidumping calculations.

Second, NAR believes the ITA acted unreasonably in excluding from their calculations tape rolls sold in the home market which were shorter than 50 meters, because this unfairly increased the dumping margin to their disadvantage. Finally, NAR contends that the dumping margin was further increased improperly to their disadvantage by the ITA's use of indirect selling expenses in the U.S. market to offset commissions paid in the home market.

Discussion

The antidumping laws of the United States are "directed to foreign products that are sold in the United States at less than fair value." *Asociacion Colombiana de Exportadores de Flores* v. *United States*, 901 F.2d 1089, 1091 (Fed. Cir. 1990); *Smith-Corona Group* v. *United States*, 713 F.2d 1568 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022, 104 S. Ct. 1274 (1984). In reaching a determination that sales in the U.S. were at less than fair value, the ITA compares the price of goods in the U.S. with their foreign market value.

This Court may review a final antidumping determination by the ITA to ascertain whether its findings were made in conformity with the law. An antidumping determination will be overturned only if it is not supported by substantial evidence on the record or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1988); *Gold Star Co.* v. *United States*, 12 CIT ——, ——, 692 F. Supp. 1382, 1383 (1988), *aff'd*, 873 F.2d 1427 (Fed. Cir. 1989). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at ——, 692 F. Supp. at 1383–84; *see Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 217 (1938); *Matsushita Elec. Indus. Co.* v. *United States*, 750 F.2d 927, 933 (1984)). The Court, however, may not substitute its judgment for that of the ITA. *SCM*

Corp. v. *United States,* 4 CIT 7, 10, 544 F. Supp. 194, 197 (1982). Hence, deference is given to the expertise of the administrative agency regarding factual findings. With these principles in mind, the Court now addresses the specific assertions made by plaintiff.

Cost Adjustments for Physical Differences

NAR first argues that the ITA should not have made cost adjustments for the physical differences between the tape sold in the home market (Italy) and the tape sold in the United States. *Plaintiff's Memorandum in Support of Motion for Judgment upon an Agency Record ("Plaintiff's Memorandum")* at 11.

If the price at which goods are sold in the United States is less than their foreign market value, the difference between the two is the dumping margin and antidumping duties must be paid to offset it. 19 U.S.C. § 1673 (1988); *Ansaldo Componenti, S.p.A.* v. *United States,* 10 CIT 28, 35, 628 F. Supp. 198, 204 (1986). The regulations promulgated by the Secretary state that when comparing the home market selling price with the U.S. selling price for the purpose of determining whether antidumping duties shall be assessed, "due allowance shall be made for differences in the physical characteristics of the merchandise in the markets being compared." 19 C.F.R. § 353.16 (1988). The physical differences are most relevant inasmuch as they are related to differences in costs of production, so long as the ITA is satisfied that "any price differential is wholly or partly due to such differences," though the effect of the differences on market value is also to be considered. *Id.* The reason for these adjustments for physical differences is "to obtain a fair comparison of prices at which identical or similar merchandise is sold in two different markets, at the same point in a chain of commerce, and under similar commercial conditions." *U.H.F.C. Co.* v. *United States,* 13 CIT ——, ——, 706 F. Supp. 914, 920 (1989).

The merchandise at issue is pressure sensitive plastic tape. The ITA, in its questionnaire dated November 6, 1986, requested that NAR "identify the most similar types of merchandise that you sell domestically," if the merchandise sold in the United States is physically different from the domestically sold product. *ITA Questionnaire* (Nov. 6, 1986) in *Public Reel* at 34. Furthermore, NAR was instructed to submit "cost difference[s] attributable to each physical difference." *Id.* The questionnaire specifically explained that NAR must "provide two separate lists quantifying the cost differences between the home market comparison tapes and the tapes that [were] exported to the United States." *Id.* at 35.

NAR's response stated that the company "produces two similar products for packaging in the sizes under investigation." *NAR Questionnaire Response* (Feb. 4, 1987) in *Public Reel* at 90.[2] It went on to distinguish the two tapes based on weight and color, adding "[n]ot

[2]The two products listed were pressure sensitive tape with PVC film, and pressure sensitive tape with POLYPROPYLENE (PP) film. *Questionnaire Response* in *Public Reel* at 90.

to distort the purpose of the antidumping review, it is essential that for the comparison Commerce follows the classes of colours we have indicated." *Id.* at 91. The ITA, however, did not accept these distinctions. Hence, in its deficiency letter of July 2, 1987, the ITA again asked which tape sold by NAR in its home market was most similar to the tape sold in the U.S. *ITA Deficiency Letter* in *Public Reel* at 122. Once more, the ITA asked for "the difference in the cost of manufacturing * * * between the U.S. and home market tapes." *Id.*

NAR's response reiterated its prior statement that it made only two different tapes: the tape with PVC film and the tape with PP film, both of which are sold in both markets. *NAR Deficiency Response* (July 23, 1987) in *Public Reel* at 125. However, NAR acknowledged that there was a difference between the tape sold in the U.S. and the tape sold in the home market; that is, the difference in the length of the rolls. *Id.* The short roll sold in the U.S. contains 50 meters of tape, while the short roll sold in the home market (Italy) holds 66 meters. The long roll sold in the U.S. holds 914 meters, while in the home market the long roll is 990 meters. *Id.* Nonetheless, NAR indicated that there were no real physical differences between the products sold in the home market and in the U.S., and thus there was no reason to make cost adjustments.

However, the ITA rejected NAR's proposed groupings by classes of colors in the third administrative review. 51 Fed. Reg. 43,955 (Dec. 5, 1986). In its petition, 3M urged that the ITA should again reject these groupings because the only way to "test N.A.R.'s questionable position that no difference-in-merchandise adjustments are necessary" is to obtain, analyze and verify NAR's production costs for both the home market and U.S. tapes. *Id.* NAR's response was to criticize Commerce's groupings as "creat[ing] distortions adverse to NAR," and to urge Commerce "to adopt the product groupings advanced by NAR." *NAR Letter* (Oct. 20, 1987) in *Public Reel* at 181–82.

The ITA decided not to make cost adjustments in its preliminary findings. But 3M, in its subsequent comments, stated that the difference in the size of the rolls did constitute a physical difference and did relate to costs of production. *3M Comments* (Feb. 16, 1988) in *Public Reel* at 221–22. In its petition, 3M charged that the 66 meter and 990 meter tapes made for the home market were cheaper to produce than the 50 meter and 914 meter tapes made for the U.S. market. *Id.* 3M attributed this cost differential to the fact that the same size core is used "regardless of how much tape is wound around it." *Id.* at 221. Also, petitioner stated that the slitting cost per square meter is greater for the shorter rolls because of greater labor and factory overhead costs.

Therefore, "a dumping comparison between shorter U.S. tape and longer home market tape, absent * * * adjustments, is distorted in the exporter's favor, and dumping margins are thereby reduced or eliminated." *Id.* Consequently, 3M argued, there is a need to adjust

the cost of the rolls destined for export to reflect differences in physical characteristics which caused the cost differences.

NAR, in its response to the preliminary results and in supplemental comments, remained reticent on the issue of cost adjustments. *Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment Upon an Agency Record* ("*Defendant's Memorandum*") at 6.[3] Since NAR did not provide the requested cost information on its production of tape rolls, the ITA resorted to using the best information available ("BIA").

BEST INFORMATION AVAILABLE

The ITA is authorized expressly by 19 U.S.C. § 1677e to use best information if it is "unable to verify the accuracy of the information submitted," or if a party under investigation "refuses or is unable to produce information requested in a timely manner and in the form required." 19 U.S.C. § 1677e (b) and (c) (1988); *Atlantic Sugar, Ltd.* v. *United States,* 744 F.2d 1556 (Fed. Cir. 1984); *Uddeholm Corp.* v. *United States,* 11 CIT 969, 676 F. Supp. 1234 (1987).

NAR maintains that it could not produce the data requested by the ITA because its accounting techniques do not tabulate costs on the basis of the lengths of the rolls. *Plaintiff's Memorandum* at 12. In its questionnaire response of February 4, 1987, NAR sought to steer the ITA's antidumping investigation away from production costs grouped by length of rolls and toward costs grouped by "classes of colours," the way its internal accounting is done. *Id.* at 91. NAR now accuses the ITA of improperly using best information available as a means of "penaliz[ing] NAR for the way in which it kept its production cost records." *Plaintiff's Memorandum* at 12.

It is for the ITA to conduct its antidumping investigations the way it sees fit, not the way an interested party seeks to have it conducted. The ITA's use of best information available has been upheld where a party tried to direct the ITA's investigation. *Pistachio Group of the Ass'n of Food Indus., Inc.* v. *United States,* 11 CIT 668, 671 F. Supp. 31 (1987). In such a case, the best information rule may be used to prevent a respondent from controlling the results of an antidumping investigation "by selectively providing the ITA with information." *Olympic Adhesives, Inc.* v. *United States,* 899 F.2d 1565, 1572 (1990).

Similarly, if a party does not produce the information *as requested,* the ITA is entitled to invoke 19 U.S.C. § 1677e and use best information available. This Court has consistently confirmed the ITA's authority to use best information available when parties are unwilling or unable to produce information in a timely manner and *in the form requested,* in order "to facilitate timely completion of administrative proceedings." *Tai Yang Metal Indus. Co.* v. *United States,* 13 CIT ——, ——, 712 F. Supp. 973, 977 (1989). *See also An-*

[3] 3M's comments contain a certificate of service indicating that a copy of the comments was mailed to NAR. *Public Reel* at 226. Hence, NAR had notice of 3M's comments concerning the cost adjustments for physical differences.

saldo Componenti, 10 CIT 28, 628 F. Supp. 198. In fact, the best information rule has been compared to an investigative tool which the ITA may use to prod into action "recalcitrant parties * * * whose failure to cooperate may work against their best interest." *Atlantic Sugar,* 744 F.2d at 1560.

In the present action, NAR submitted cost information as it recorded it, that is, based on "classes of colours." *NAR Questionnaire Response* (Feb. 4, 1987) in *Public Reel* at 90–91. The ITA thereafter specifically requested information on cost differences between the tape sold in the home market and the tape sold in the U.S. *ITA Deficiency Letter* in *Public Reel* at 122. NAR never provided answers to this particular request.

NAR states that it "neither refused nor was unable to produce [the] information requested." *Plaintiff's Memorandum* at 14. Yet in the same paragraph NAR concedes that "the form of [its] submissions was based upon *NAR's* record keeping and ordinary accounting principles." *Id.* (emphasis added). Commerce's regulations expressly state that best information available will be used if information "is not submitted in a timely fashion or *in the form required.*" 19 C.F.R. § 353.51(b) (1988) (emphasis added). Hence, it is not sufficient that NAR provided cost information according to its internal procedures if those procedures did not produce what the ITA specifically requested.

Seeing that NAR could not or would not provide the details in the form required, the ITA was justified in seeking to obtain the data it wanted and had requested repeatedly and precisely, based on the best available information.[4] Therefore, the ITA's use of best information available was in accordance with law and is supported by substantial evidence in the record.[5]

Use of Another Manufacturer's Cost Data as BIA

NAR next argues that, even if the ITA's use of best information was appropriate, its use of another manufacturer's cost data was not. When use of best information is challenged, the question is not whether the ITA has chosen the "best" of all available information, but rather whether the information chosen by the ITA is supported by substantial evidence on the record. *Chinsung Indus. Co.* v. *United States,* 13 CIT ——, ——, 705 F. Supp. 598, 601 (1989). Otherwise, the administrative process would be frustrated and the burden of creating an adequate record would shift from respondents to the ITA. *Id.* The Court must uphold ITA's use of best information avail-

[4]Unlike the situation in *Olympic Adhesives,* plaintiff here did not "provide complete answers to the questions presented in an information request." *Olympic Adhesives,* 899 F.2d at 1574. The information requested repeatedly and specifically by ITA was the cost differential between the tape rolls made for the home market and the tape rolls made for the U.S. market. Since NAR did not provide this information; its answers were not complete.

[5]NAR distinguishes its conduct from that of plaintiff in *Ansaldo Componenti, supra,* suggesting that use of best information is not proper unless plaintiff's conduct is consistently "unresponsive, insufficient, and untimely" and "conspicuously uncooperative." *Ansaldo Componenti,* 10 CIT at 36, 628 F. Supp. at 205. However, the best information rule was never meant to be used only against the most obtrusive offenders. The statute and accompanying regulations explicitly indicate that the best information rule is to be used when a party does not answer the ITA's questions. 19 U.S.C. § 1677e; 19 C.F.R. § 353.51.

able if the use of that data is supported by substantial evidence in the record and otherwise in accordance with law.

The information the ITA may use as best information includes "all information that is accessible or may be obtained, whatever its source." *Timken Co.* v. *United States,* 11 CIT 786, 788, 673 F. Supp. 495, 500 (1987) (citing *Budd Co.* v. *United States,* 1 CIT 67, 75, 507 F. Supp. 997, 1003–04 (1980)). This encompasses "the information submitted in support of the petition." 19 C.F.R. § 353.51(b). Furthermore, best information available "is not necessarily accurate information, it is information which becomes usable because a respondent has failed to provide accurate information." *Asociacion Colombiana de Exportadores de Flores* v. *United States,* 13 CIT ——, ——, 704 F. Supp. 1114, 1126 (1989), *aff'd,* 901 F.2d 1089 (Fed. Cir. 1990).

The information that the ITA relied on as best information available was "another firm's publicly available cost data on merchandise differences for the last review period." 53 Fed. Reg. 16,444. That firm, Manuli Autoadesivi S.p.A. ("Manuli"), manufactures a tape for sale in Italy, which the ITA claims is similar to the tape made by NAR. NAR, however, asserts that the Manuli tape used by the ITA was not Manuli's most comparable product, and therefore, the cost figures for that tape should not have been used as best information available.

The ITA used Manuli 316 Stampato tape as a substitute for NAR's tape so as to garner best information available as to cost differences between U.S. and home market tapes. Manuli exported a number of tapes, but the ITA chose the one with the highest cost differences. According to Commerce, since

> N.A.R. had failed to provide Commerce with any of its relevant [cost] data, and there were a myriad of possibilities involving N.A.R.'s actual production costs for the different length tapes, Commerce chose the highest cost difference reported by Manuli in the third administrative review as best information available and adjusted the foreign market value accordingly for N.A.R.'s tapes.

Defendant's Memorandum at 21.

Commerce adds that the information upon which it may rely as best information available is "that information in which Commerce has 'reasonable and justified confidence' and which is reasonably accessible given the time constraints of an antidumping investigation." *Id.* at 21–22 (citing *Porcelain-on-Steel Cooking Ware from Taiwan; Final Determination of Sales at Less Than Fair Value,* 51 Fed. Reg. 36,425, 36,427 (Oct. 10, 1986)). Commerce claims that without any information on cost differences from NAR, it could not reasonably rely on Manuli's lower cost differentials as being indicative of NAR's actual cost differences. *Id.* at 22.

NAR professes that the Manuli tape chosen by the ITA is "completely different" from NAR's tape sold in the U.S. during the review period and therefore should not form the basis for best infor-

mation available. *Plaintiff's Memorandum* at 15. According to NAR, what makes the tapes so different is that the Manuli tape is a *printed* tape whereas the NAR tape is not printed. Hence, the Manuli tape "has an additional printing process in its production making its production more expensive." *Id.* In essence, NAR is arguing that "the difference reported by Manuli had to do solely with the difference in *printing costs* from U.S. to home market." *Id.* at 16 (emphasis in original). NAR further insists that Manuli's submissions prove that the cost differences for that particular tape "are greater by far than those between any other type of tape reported." *Id.*

If the cost differences in Manuli's tape sold in the U.S. and home market indeed are due solely to varied printing costs, rather than just differences in per square meter costs generally, then NAR would be justified in disputing the use of Manuli's 316 Stampato tape data. Since NAR's tape sold in the U.S. at that time was not printed, its cost differences may well have been different from Manuli's. While the Court finds the difference in the size of the rolls does constitute sufficient basis for Commerce to make cost adjustments, the Court is not convinced that Commerce's confidence in the Manuli data as best information available was "reasonable and justified" given the potential for significant differences in printing costs.

Therefore, the Court remands this issue to the ITA so that the agency may explain its reasons for choosing Manuli's printed tape as best information available, rather than a tape which is similar to the tape NAR sold in the U.S. during the review period. Lastly, Commerce is directed to use another tape's cost figures as best information available if it determines that the printing costs created greater cost differences than there would have been if there were no printing costs.

Such or Similar Merchandise

NAR also contends that the ITA, in its calculation of foreign market value, should have included sales of "*all* sizes of pressure sensitive plastic tape sold in the home market including those rolls shorter than 50 meters." *Plaintiff's Memorandum* at 22 (emphasis in original). NAR claims that these shorter rolls are "such or similar merchandise" as defined in 19 U.S.C. § 1677(16), and therefore should have been included in the investigation.[6] Exclusion of the

[6] 19 U.S.C. § 1677(16) defines such or similar merchandise as

(A) The merchandise which is the subject of an investigation and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.

(B) Merchandise—

(i) produced in the same country and by the same person as the merchandise which is the subject of the investigation,

(ii) like that merchandise in component material or materials and in the purposes for which used, and

(iii) approximately equal in commercial value to that merchandise.

(C) Merchandise—

(i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,

(ii) like that merchandise in the purposes for which used, and

Continued

shorter rolls, NAR argues, caused the foreign market value to be calculated improperly.

Commerce counters that the Court should not even reach this issue because the ITA's decision to exclude sales of the shorter rolls "was made early on in the administrative proceeding and was well-documented in the administrative record." *Defendant's Memorandum* at 23. Since NAR "never questioned this action during the administrative proceeding," Commerce claims that NAR "failed to exhaust its administrative remedies" regarding this issue and thus it is not ripe for judicial review. *Id.*

Exhaustion of Remedies

In *LMI–LA Metalli Industriale, S.p.A.* v. *United States,* 13 CIT ——, 712 F. Supp. 959 (1989), *appeal docketed,* No. 89–1532 (Fed. Cir. June 16, 1989), the Court held that exhaustion of administrative remedies is generally required before a litigant may raise a claim in a civil action. 13 CIT at ——, 712 F. Supp. at 968; *see also* 28 U.S.C. § 2637(d) (1988); *Sharp Corp.* v. *United States,* 837 F.2d 1058, 1062 (Fed. Cir. 1988). Exceptions to the exhaustion doctrine in non-classification cases do exist, and thus application of the doctrine must be determined on a case by case basis. *Alhambra Foundry Co.* v. *United States,* 12 CIT ——, ——, 685 F. Supp. 1252, 1256 (1988); *Timken Co.* v. *United States,* 10 CIT 86, 93, 630 F. Supp. 1327, 1334 (1986).

Exceptions have been found where the requirement of exhaustion "would be futile or an insistence on a useless formality." *Alhambra,* 12 CIT at ——, 685 F. Supp. at 1256. Also, the Court has waived the condition where to pursue an administrative resolution "could not lead to relief" or would yield "manifestly inadequate remedies." *Id.* (citations omitted.[7] The Court has also recognized an exception "where Commerce did not adhere to controlling judicial precedents" and where a party's arguments were based on facts in the confidential record and the party was not informed of the deadline for access to the record. *Id.* (citing *Philipp Bros., Inc.* v. *United States,* 10 CIT 76, 78, 630 F. Supp. 1317, 1320 (1986)).

In light of this case law, the Court must determine if the exhaustion doctrine bars plaintiff from raising this issue. The ITA selects product groupings for model match comparisons of such or similar merchandise based on one of the criteria in 19 U.S.C. § 1677(16). The computer printout regarding the ITA's preliminary results, dated December 30, 1987, indicates that certain home market sales were excluded from these groupings. *Preliminary Results Computer Printout* (Dec. 30, 1987) in *Non-Public Reel* at 513–514. Among the excluded items were numbers 1570–1581, which were not assigned a

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(iii) which the administering authority determines may reasonably be compared with that merchandise.

[7]However, the Court has interpreted the manifestly inadequate" standard narrowly. Thus, "mere allegations of financial harm, or assertions that an agency failed to follow a statute, do not make the remedy established by Congress manifestly inadequate." *Alhambra,* 12 CIT at ——, 685 F. Supp. at 1256.

group number. *Id.* at 514. NAR's computer printout of sales data indicates that those numbers correspond to sales of tape less than 50 meters long. *NAR Sales Data Printout* in *Non-Public Reel* at 291. Further, Commerce has shown that the product groupings were not changed "in any way for purposes of its final results for this administrative review." *Defendant's Memorandum* at 24.

Consequently, NAR was aware, or should have been aware that the ITA had decided to exclude tape rolls shorter than 50 meters when it reviewed the printout. Thus NAR should have voiced its objections during this period. NAR asserts that the ITA "obscured its model match decision * * * [and that] plaintiff did not become aware that tape less than 50 meters had been excluded until after the publication of the final results of the review." *Plaintiff's Reply to Defendant's Memorandum in Opposition* ("*Plaintiff's Reply*") at 6.[8] The computer printouts make clear which tape rolls were included in the product groupings, and a careful reading of them would have alerted NAR to the exclusion of the shorter rolls.

NAR had an opportunity to raise this issue before Commerce during the administrative proceedings and did not. Additionally, NAR has not asserted any of the exceptions to the doctrine mentioned above, and since this Court will not *sua sponte* search the record to see if any of the exceptions apply, the Court must apply the doctrine and bar plaintiff from now contesting Commerce's product groupings on this ground. For the Court to act otherwise would be to "usurp the agency's function * * * and deprive the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Unemployment Compensation Comm'n of Alaska* v. *Aragon,* 329 U.S. 143, 155 (1946). *See also United States* v. *L.A. Tucker Truck Lines, Inc.,* 344 U.S. 33, 37 (1951); *Wieland Werke, AG* v. *United States,* 13 CIT ——, ——, 718 F. Supp. 50, 55 (1989); *LMI,* 13 CIT at ——, 712 F. Supp. at 968; *Kokusai Elec. Co.* v. *United States,* 10 CIT 166, 173, 632 F. Supp. 23, 29 (1986).

Indirect Selling Expenses

Lastly, NAR contests Commerce's decision to use indirect selling expenses to offset home market commissions paid by NAR. In the home market, NAR employed the services of independent selling agents to whom commissions were paid. NAR then used the commissions as a downward adjustment on foreign market value pursuant to 19 U.S.C. § 1677b(a)(4)(B) (1988). That section calls for the ITA to make an adjustment of foreign market value if there are "differences in circumstances of sale" between the U.S. and the home market.

[8]NAR states that handwritten notes it received from Commerce during the post-preliminary result disclosure conference indicate that tape rolls less than 50 meters *were* included in the model match groupings. *Plaintiff's Reply* at 7–8. For plaintiff to have based its belief that the shorter rolls were within model match because of this notation would have been both unreasonable and imprudent. Hence, the Court finds this evidence insufficient to support plaintiff's contention that the case be remanded so that Commerce may include the shorter rolls in its price comparisons.

An adjustment was made for the home market commissions pursuant to 19 U.S.C. § 1677b(a)(B). However, no commissions were paid in connection with sales in the United States. Hence, the ITA calculated indirect selling expenses on sales to the U.S. as an offset to deductions for commissions in the home market. NAR objects to this offset because it "eliminated a valid circumstance of sales adjustment * * * for a direct selling expense, home market commissions." *Id.*

In determining foreign market value, the ITA shall make due allowance for differences in circumstances of sale between the U.S. price and the foreign market value. 19 U.S.C. § 1677b(a)(4)(B). The regulations interpreting the statute state that, in comparing the U.S. price with the foreign market value, "reasonable allowances will be made for bona fide differences in the circumstances of the sales." 19 C.F.R. § 353.15(a) (1988). Such differences, however, generally are limited "to those circumstances which bear a direct relationship to the sales which are under consideration. *Id.*

Notwithstanding this standard, the regulation entitled "Special Rule" allows for adjustments for other selling expenses

> where a reasonable allowance is made for commissions in one of the markets under consideration and no commission is paid in the other market under consideration, the amount of such allowance being limited to the actual other selling expenses incurred in the one market, or the total amount of the commission allowed in such other market, whichever is less. In making comparisons using exporter's sales price, reasonable allowance will be made for all actual selling expenses incurred in the home market up to the amount of the selling expenses incurred in the United States market.

19 C.F.R. § 353.15(c) (1988). It is undisputed that during the review period, NAR paid commissions in the home market but not in the U.S. Therefore, Commerce used the commissions to adjust the foreign market value downward for differences in circumstances of sale pursuant to statute. Then Commerce used NAR's indirect selling expenses in the U.S. to offset the commissions adjustment. *Defendant's Memorandum* at 27.

NAR claims that the ITA should not have used indirect selling expenses in the U.S. to offset the home market commissions because the statute and regulations limit the use of the offset to determinations where the U.S. price is based on exporter's sale price ("ESP"), while in this case the U.S. price is based on purchase price. *Plaintiff's Memorandum* at 24. NAR contends this action by Commerce "artificially inflat[ed] the antidumping margins." *Id.* at 25.

However, in *NAR, S.p.A.* v. *United States*, this Court made a distinction between the first part of the regulation and the second. 13 CIT ——, 707 F. Supp. at 559. The first part of the "Special Rule" calls for an adjustment to be made for selling expenses where commissions are paid in one market but not the other. That adjustment

is limited to "the *lesser* of either the amount of commissions paid or the amount of indirect selling expenses incurred in the market not associated with the commissions." 13 CIT at ——, 707 F. Supp. at 559 (emphasis in original).

The second part of the regulation limits the allowance to be made for all actual selling expenses in the home market to the amount of selling expenses in the U.S. market. *Id.* It is this second part of the regulation only which is limited to comparisons using ESP. Since in the present action the comparison was made to purchase price and not ESP, this part is inapplicable.[9] Accordingly, Commerce's decision to use the indirect selling expenses in the U.S. to offset commissions paid in the home market is reasonable and in accordance with law and is, therefore, sustained.

Conclusion

The determination by the Department of Commerce is accordingly affirmed in part and remanded to the ITA so that the ITA may further investigate the issue of cost adjustments and its choice of another manufacturer's cost data as best information available in conformity with this opinion.

(Slip Op. 90-61)

KERR-MCGEE CHEMICAL CORP., PLAINTIFF AND CHEMETALS, INC., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND TOSOH HELLAS, A.I.C., DEFENDANT-INTERVENOR

Court No. 89-05-00276

[ITA determination sustained.]

(Decided June 28, 1990)

Drinker Biddle & Reath, (*W.N. Harrell Smith, IV, Aryeh S. Friedman, Cynthia M. Lighty*) for plaintiff Kerr-McGee Chemical Corp.

Squire, Sanders & Dempsey, (*Ritchie T. Thomas, William D. Kramer, Dana M. Stein, Miriam A. Bishop*) for plaintiff-intervenor.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, (*Jane E. Meehan, Lloyd M. Green*); (*Gregory Shorin*) Attorney-Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for the defendant.

Weil, Gotshal & Manges (*A. Paul Victor, Jeffrey P. Bialos, Ethan S. Naftalin*) for the defendant-intervenor.

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[9] NAR cites *Rhone Poulenc* for the proposition that the offset applies only "where dumping margins are determined by comparing the foreign market value with the exporter's sales price as opposed to the purchase price in the United States." 8 CIT at 68, 592 F. Supp. at 1336. Since in the present action the foreign market value is being compared to the purchase price and not ESP, NAR argues that indirect selling expenses should not be used to offset home market commissions. *Plaintiff's Memorandum* at 28. But in *Rhone Poulenc*, the Court explained that the "relevant part" of the regulation for its purposes was the second part, which is indeed expressly limited to cases involving ESP comparisons. 8 CIT at 68, 592 F. Supp. at 1336. Since that is not the case in the instant action, the reasoning there is impertinent here.

Opinion and Order

Restani, *Judge:* Plaintiffs move for judgment on the administrative record of *Final Determination of Sales at Less Than Fair Value; Electrolytic Manganese Dioxide [EMD] from Greece,* 54 Fed. Reg. 8,771 (1989) (*Final Determination*). In the case at hand ITA found sufficient above cost home market sales of merchandise similar to that under investigation to form a basis for calculating foreign market value (FMV) under 19 U.S.C. § 1677b(a)(1) (1988), the standard method for computing FMV for comparison with United States price. *Final Determination,* 54 Fed. Reg. at 8,773–74. Plaintiffs ask the court to remand this case to the International Trade Administration (ITA or Commerce) for ITA to apply the special provisions for calculating FMV applicable to multinational corporations (MNC rule), 19 U.S.C. § 1677b(d) (1988). Plaintiffs assert that ITA, by applying 19 C.F.R. § 353.4(a) (1988), improperly ascertained the viability of defendant-intervenor Tosoh Hellas's Greek home market EMD sales for purposes of computing FMV. Plaintiffs also claim that ITA's analysis of which merchandise in the Greek market was "similar" to the products under investigation was improper, that the period of investigation should have been extended or other adjustments should have been made to avoid distortions from production bunching, and that ITA improperly calculated cost of production, and therefore below cost sales were erroneously accepted as viable home market sales.

Defendant-intervenor responds that ITA's application of the standards set forth in 19 C.F.R. § 353.4(a) for purposes of determining home market sales viability was proper. Defendant-intervenor further asserts that Commerce's determination that alkaline and zinc EMD are similar was correct, but that Commerce should have considered alkaline EMD sales as non-viable and utilized only zinc EMD sales in determining home market sales viability. Finally, defendant-intervenor maintains that Commerce's cost of production calculations were proper. The governmental defendant seeks affirmation of each of ITA's findings discussed here.

I. Facts

A. *ITA Proceedings:*

Plaintiffs, Chemetals and Kerr-McGee, filed their petition on May 31, 1988, whereupon ITA initiated its investigation, *Initiation of Antidumping Duty Investigation; Electrolytic Manganese Dioxide From Greece,* 53 Fed. Reg. 24,114 (1988), made a preliminary determination, *Electrolytic Manganese Dioxide From Greece; Preliminary Determination of Sales at Less Than Fair Value,* 53 Fed. Reg. 45,793 (1988), held hearings, and imposed dumping duty deposits of 36.72% following the final determination. The ITA investigation extended from December, 1987 through May, 1988 and covered EMD sales by Tosoh Hellas, a Japanese company's Greek affiliate created in a

joint venture agreement under Greek law. At approximately the same time ITA also investigated EMD sales by Tosoh Hellas's Irish sister and by its parent company in Japan. *See Initiation of Antidumping Investigation; Electrolytic Manganese Dioxide from Ireland,* 53 Fed. Reg. 24,115 (1988); *Initiation of Antidumping Investigation; Electrolytic Manganese Dioxide from Japan,* 53 Fed. Reg. 24,116 (1988). *See also Kerr-McGee* v. *United States,* Slip. Op. 90–52 (CIT June 5, 1990) (*Kerr-McGee I*).

B. *EMD Production:*

According to Tosoh Hellas' submission to ITA the production process for the two different grades of EMD at issue, zinc and alkaline, differ only in the neutralization and grinding of the manganese oxide base. Confidential Record Appendix (CRA) Vol. II, Doc. 14 at 446A. The record reflects that manganese ore is ground, reduced, then leached and filtered to remove impurities. CRA Vol. I, Doc, 8 at 266A. It is next treated in an electrolytic process, washed in water, and dried in a furnace. *Id.* The manganese flakes are then ground and their PH is adjusted to produce different EMD grades. *Id.* Further filtration and drying precedes final packaging. *Id.* The different grades of EMD are used generally in different types of dry cell batteries; that is, alkaline EMD is used in alkaline batteries and zinc EMD is used in zinc batteries. *See* CRA Vol. II, Doc. 31 at 877A. In addition, alkaline batteries have a longer life than zinc batteries. *Id.*

II. Discussion

A. *Background:*

The court will uphold an ITA determination under the unfair trade laws unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law" under 19 U.S.C. § 1516a(b)(1)(B) (1988). The court "will affirm the agency's findings if they are supported in the record by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Alhambra Foundry Co., Ltd.* v. *United States,* 12 CIT ——, 685 F. Supp. 1252, 1255 (1988) (citations omitted).

ITA's less than fair value determination is dependent on a three step inquiry: (1) ascertaining FMV of the imported merchandise, 19 U.S.C. § 1677b (1988), (2) calculating United States price of such merchandise, 19 U.S.C. § 1677a(a) (1988), and (3) determining the dumping margin, *e.g.* the difference between FMW and U.S. price, 19 U.S.C. § 1673 (1988). The focus in the present case is on the first step of the inquiry, namely calculating FMV. The key issue here is whether EMD sales in the Greek home market were inadequate so as to warrant calculation of FMV on the basis of Tosoh Hellas's parent's Japanese market sales pursuant to the MNC Rule.

Section 1677b instructs ITA to determine FMV by calculating "the price * * * at which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country from which exported." 19 U.S.C. § 1677b(a)(1)(A). If home market sales of the merchandise are not adequate as a basis for comparison with United States sales, ITA normally would turn to third country sales to determine FMV. 19 U.S.C. § 1677b(a)(1)(B). Alternatively, ITA may use, in certain circumstances, cost of production based "constructed value" under § 1677b(e). 19 U.S.C. § 1677b(a)(2). Special rules apply to nonmarket economy countries and, as indicated, to multinational corporations. 19 U.S.C. §§ 1677b(c) & (d). The MNC rule discussed here is intended to prevent multinational corporations from circumventing the antidumping laws by exporting merchandise from a foreign subsidiary with a low FMV, if FMV were calculated on home market sales. S. Rep. No. 1298, 93d Cong., 2d Sess. 174, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7186, 7311. *See also* Powell & McInerney, *Globalization of the Production Process and the Unfair Trade Laws* 22–23 (1989) in *The Commerce Department Speaks: 1990* at 9 (1990).

The MNC rule requires that FMV be calculated "by reference to the foreign market value at which such or similar merchandise is sold in substantial quantities by one or more facilities outside the country of production," whenever (1) the facility under investigation is jointly owned by a foreign national, (2) the sales of the merchandise at issue or similar merchandise are "non-existent or inadequate as a basis for comparison with sales of the merchandise to the United States," *and* (3) FMV of the merchandise of facilities outside the country of exportation is higher than the FMV of merchandise produced in the facility under investigation. 19 U.S.C. § 1677b(d).[1] With regard to the second of the three requirements for application of the MNC rule, ITA found sales of the merchandise, or similar merchandise, in the Greek home market "adequate." *Final Deter-*

[1]In *Preliminary Determination of Sales at Less Than Fair Value: Certain Small Business Telephone Systems and Subassemblies Thereof From Taiwan*, 54 Fed. Reg. 31,987 (1989), *appeal pending from Final Determination of Sales at Less Than Fair Value: Certain Small Business Telephone Systems and Subassemblies Thereof From Taiwan*, 54 Fed. Reg. 42,543 (1989) *sub nom. Auto Telecom. Ltd.* v. *United States*, CIT No. 90–01–00029 (filed April 26, 1990), Commerce noted that there are two stages to an MNC investigation under section 1677b(d). 54 Fed. Reg. at 31,988. According to Commerce, "[i]n the first stage, the Department must establish that the five criteria for applying the MNC provision are satisfied * * *. In the second stage, assuming the five criteria are met, the Department must calculate FMV by reference to the FMV of such or similar merchandise produced in facilities outside the country of exportation." *Id.*

The five criteria are:

(1) Merchandise exported to the United States is being produced in facilities which are owned or controlled, directly or indirectly, by a person, firm or corporation which also owns or controls, directly or indirectly, other facilities for the production of such or similar merchandise which are located in another country or countries.

(2) The sales of such or similar merchandise by the company concerned in the home market of the exporting country are non-existent or inadequate as a basis for comparison with the sales of the merchandise to the United States.

(3) The foreign market value (FMV) of such or similar merchandise produced in one or more of the facilities outside the country of exportation is higher than the foreign market value of such or similar merchandise produced in the facilities located in the country of exportation.

(4) * * * any observed differences in FMV are not solely attributable to physical differences in merchandise.

(5) Any observed differences in value between the FMV of products produced outside the country of exportation and the FMV of products produced in the country of exportation are not solely attributable to differences in costs of production, pursuant to the final paragraph of the MNC provision.

54 Fed. Reg. at 31,988.

mination, 54 Fed. Reg. at 8,773.[2] Plaintiffs assert that ITA erred in so finding.

B. *Similarity Analysis under 19 U.S.C. § 1677(16):*

To determine whether sales in the exporting country's home market are "nonexistent or inadequate" under the second prong of 19 U.S.C. § 1677b(d), ITA must ascertain the category or categories of merchandise, identical or similar to that under investigation, which it will examine to determine adequacy of home market sales. The product under investigation, that is the merchandise at issue, is EMD generally. It is obvious that ITA believes that a "class or kind of merchandise" under investigation, *see* 19 U.S.C. § 1673, in some cases may consist of several categories of merchandise which are not "similar" to each other under the language of 19 U.S.C. § 1677(16) (1988).[3] For example, *Color Television Receivers From Korea; Final Results of Antidumping Duty Administrative Review*, 53 Fed. Reg. 24,975, 24,981 (1988), states:

> [S]ection 353.4 of our Regulations instructs us to determine that the total sales of such or similar merchandise is 5 percent or more of the sales of that merchandise to third countries. In making this determination, we established separate 'such or similar' categories based on CTV screen size. All home market models generally within two screen sizes and containing the same tuning system as a given U.S. model were grouped in the same category. The 5% viability test described was then ap-

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[2]The MNC rule has been applied in few instances. For example, in *Certain Steel Wire Nails From the Republic of Korea; Antidumping: Final Determination of Sales at Less Than Fair Value and Exclusion From Investigation*, 45 Fed. Reg. 34,941 (1980), ITA calculated FMV in the "unusual way" of applying the MNC rule to Japanese subsidiary corporations which operated in a Korean Free Trade Zone, had no home market sales during the investigatory period, and showed prices lower than "trigger prices," the best information available on Japanese FMV. *Id.* at 34,943. In *Preliminary Determination of Sales at Less Than Fair Value: Ball Bearings and Parts Thereof From Thailand*, 53 Fed. Reg. 45,334 (1988), Commerce declined to apply the MNC rule, as the Thai home market was found viable under the criteria of 19 C.F.R. § 353.4. Commerce stated that because "home market sales do provide an adequate basis for comparison with the sales of the merchandise to the United States [,] * * * we * * * determined that the special rule for multinational [corporations] does not apply with respect to sales of the subject merchandise from Thailand." *Id.* at 45,335. Accordingly, Commerce declined to review the Japanese parent's home market price information. *Id. See also Final Determination of Sales at Less Than Fair Value: Ball Bearings and Parts Thereof From Thailand*, 54 Fed. Reg. 19,117, 19,119 (1989) (referring to Appendix B to *Final Determination of Sales at Less Than Fair Value: Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany*, 54 Fed. Reg. 18,992, 19,027 (1989) (declining to apply MNC rule even though sales were below the five percent threshold, as it was not shown that Japanese or Singapore prices were higher than home market prices in the exporting country)), *appeal pend. sub nom. The Torrington Co.* v. *United States*, CIT No. 89–06–00308 (filed June 30, 1989). In *Certain Steel Wire Nails From the Republic of Korea; Antidumping: Final Determination of Sales at Less Than Fair Value and Exclusions From Final Determination*, 47 Fed. Reg. 27,392 (1982), Commerce applied the MNC rule to a Korean subsidiary operating in a Free Trade Zone. *Id.* at 27,394.

[3]19 U.S.C. § 1677(16) states:

The term 'such or similar merchandise' means merchandise in the first of the following categories in respect of which a determination for the purposes of part II of this subtitle can be satisfactorily made:

(A) The merchandise which is the subject of an investigation and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.

(B) Merchandise—

(i) produced in the same country and by the same person as the merchandise which is the subject of the investigation,

(ii) like that merchandise in component material or materials and in the purposes for which used, and

(iii) approximately equal in commercial value to that merchandise.

(C) Merchandise—

(i) produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation,

(ii) like that merchandise in the purposes for which used, and

(iii) which the administering authority determines may reasonably be compared with that merchandise.

> plied to each category found to be viable. We do not consider sales of one model to constitute the universe of sales for viability of the entire home market. We consider such an interpretation of 'such or similar merchandise' for purposes of determining home market viability to be overly specific.

See also Final Determination of Sales at Less Than Fair Value: Certain Small Business Telephone Systems from Taiwan, supra, 54 Fed. Reg. at 42,544 (1989); *Lightweight Polyester Filament Fabric From Japan; Final Determination of Sales at Less Than Fair Value,* 49 Fed. Reg. 472, 473 (1984); *Lightweight Polyester Filament Fabrics From the Republic of Korea; Final Determination of Sales at Less Than Fair Value,* 48 Fed. Reg. 49,679, 49,680–81 (1983).

None of the parties challenges this concept of dissimilar products within a class. In this case, however, analysis of EMD appears to have convinced ITA that alkaline EMD and zinc EMD were sufficiently similar to be considered together for home market sales viability purposes. *See Final Determination,* 54 Fed. Reg. at 8,773. ITA found both zinc and alkaline EMD to be produced from the same ingredients. *Id.* Although they differ in ultimate use (alkaline EMD being used for alkaline batteries and zinc EMD for zinc batteries), both types of EMD perform the same essential battery filler function. *Id.* ITA found in particular that "the two types of EMD are produced in the same production process and differ only in final finishing." *Id.* ITA also found no difference in the composition of either EMD type, minimal cost differences in production, equal commercial value, and use of both in the production of dry cell batteries. *Id.*

ITA's practice in analyzing similarity in a merchandise specific and in a market context appears to be in accord with Congress's intent with regard to the term "such or similar." *See* H.R. Report No. 1261, 85th Cong., 2d Sess. 7 (1957). In its report Congress gave the following example:

> If, for example, long-handled shovels are sold to the United States, and only short-handled (otherwise identical) shovels are sold for home consumption in the country of exportation, then it is possible to consider the two types of shovel "similar," and a price determination can be made by comparing the two similar shovels, making allowance for the fact that the long handles cost more than the short handles.

Id.

As stated in *Final Determination of Sales at Less Than Fair Value, Portland Hydraulic Cement From Japan,* 48 Fed. Reg. 41,059 (1983), determining "such or similar" categories for FMV purposes requires ITA to look at "similar but not necessarily the same component materials." *Id.* at 41,060. In general, the statutory scheme requires ITA to balance a variety of factors depending on the product at issue.

Although plaintiffs argued before the agency that alkaline and zinc EMD were dissimilar as a factual matter, they have not made that case before the court.[4] Instead they argue in essence that because zinc and alkaline EMD are both sold in the home market and are recognized as non-identical by ITA, zinc EMD cannot form the basis of a home market sales viability determination for alkaline EMD, and vice-versa. Plaintiffs assert that 19 U.S.C. § 1677(16), the applicable section defining "such or similar," mandates that once having found several non-identical categories of subject merchandise, ITA should perform its viability test on a category by category basis. Memorandum in Support of Plaintiffs' Motion for Judgment upon the Agency Record at 32–35. (P. Brief). Plaintiffs claim ITA should have calculated home market sales viability with respect to alkaline EMD only on the basis of alkaline sales. Alkaline sales being inadequate, plaintiffs maintain that ITA should have applied the MNC rule. *Id.*

It is true, as plaintiffs maintain, that the analysis of viability stops where there are sufficient identical sales in the home market to provide a satisfactory basis for comparison. P. Brief at 33. *See* 19 U.S.C. § 1677(16); *See also Monsanto Co.* v. *United States,* 12 CIT ——, 698 F. Supp. 275, 278 (1988); *Anti-dumping; Mirrors in Stock Sheet and Lehr End Sizes From Italy; Final Determination of Sales at Less Than Fair Value,* 51 Fed. Reg. 43,406, 43,410 (1986). The statute, however, directs ITA to continue its search for similar home market products if inadequate identical merchandise is produced in the exporting country. The statute specifies in particular that ITA must examine the section 1677(16) list and choose "the first of the * * * categories in respect of which a determination * * * can satisfactorily be made." 19 U.S.C. § 1677(16). Only when there are no sales or offers of the identical *or similar* merchandise in the home market, or when home market sales of identical or similar merchandise are "so small" in relation to third country sales that no adequate comparison can be made, or are "inadequate" for comparison purposes, is ITA to turn to third country sales, constructed value, or the MNC rule to arrive at FMV. 19 U.S.C. § 1677b(a)(1), (a)(2), (b) & (d).[5]

ITA's finding of similarity among the non-identical categories of merchandise sold in the home market prevented it from finding home market sales non-viable on the basis of the inadequacy of non-identical merchandise. ITA appears to have followed the statute in basing its home market sales viability analysis on similar merchandise.[6]

[4] Whether or not they preserved this claim in their Complaint is irrelevant because plaintiffs took no steps by briefing before the court or otherwise to show ITA erred in its factual finding of similarity.

[5] As indicated earlier, special rules apply to nonmarket economies. *See* 19 U.S.C. § 1677b(c).

[6] ITA aggregated zinc and alkaline EMD sales and found them adequate so as not to trigger application of the MNC rule. Defendant-intervenor's claim that ITA is required to look first at products identical to those in the U.S. market, and then, if not found sufficient, to disregard them and look separately at similar products to make a home market viability analysis need not be reached in this case because the home market is adequate under either approach. Likewise the question of whether price comparisons as opposed to market viability determina-

Continued

C. *Standards for Determining Home Market Sales Viability:*

Having determined the scope of "such or similar" merchandise for purposes of assessing the adequacy of home market sales, the next issue is how to determine adequacy. ITA found that EMD sales in the home market were adequate because they were well above the five percent viability standard for home market sales set forth in 19 C.F.R. § 353.4. *Final Determination* at 8,774. ITA applied no other standard, asserting that the introductory language to that regulation did not require it to turn to 19 C.F.R. § 353.9 (1988), the regulation reflecting application of the MNC rule, unless the initial viability determination showed inadequate home market sales. *Id.* at 8,773–74. ITA stated in conclusion that "unless the five percent test of § 353.4 indicates that there is no viable home market, the requirements of the multinational corporations provision have not been met." *Id.* at 8,774.

The specific issue raised by plaintiffs is whether ITA abused its discretion or erred in its application of the law in deciding that 19 C.F.R. § 353.4(a) provides an appropriate standard for calculating home market sales viability in the MNC context. Under its traditional 19 C.F.R. § 353.4(a) viability analysis, ITA compares home market sales with third country sales and will find home market sales adequate for FMV purposes if they total five percent of sales to third countries (not the United States).[7] To ascertain whether there is a viable home market, ITA asks whether "the quantity of such or similar merchandise sold for consumption in the country" is so small in relation to "the quantity sold for exportation" to third countries, "as to be an inadequate basis for determining the foreign market value of the merchandise imported into the United States." 19 C.F.R. § 353.4(a). ITA "normally" uses "five percent of the amount sold to third countries" as the cut-off point for its adequacy determination. *Id.*

Plaintiffs claim that ITA's entire approach is inappropriate, and that the MNC rule dictates an approach grounded in the statutory purpose, whereby ITA would consider a multinational corporation's worldwide profit pattern in addition to its production patterns and the purchasing policies of its customers to determine whether the statute's provisions apply. P. Reply Brief at 5–9. Plaintiffs also claim that over 95 percent of Tosoh Hellas's annual production is

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tions should be made on the basis of "inadequate" identical merchandise was not raised and need not be addressed. *See Final Determination* at 8,775. *See also Lightweight Polyester Filament Fabric From Japan, supra,* 49 Fed. Reg. at 475.

[7] 19 C.F.R. § 353.4(a) (1988) states:

> (a) *In general.* If it is established, in a situation other than that provided for in § 353.9, that during the representative period chosen for investigation the quantity of such or similar merchandise sold for consumption in the country of exportation to countries other than the United States (normally, less than five percent of the amount sold to third countries) as to be an inadequate basis for determining the foreign market value of the merchandise imported into the United States, the foreign market value of the imported merchandise shall be determined either by reference to the price at which such or similar merchandise is sold or offered for sale for exportation to countries other than the United States or by reference to its constructed value.

This provision was renumbered as of April, 1989.

exported, and that this indicates an inadequate home market. *See* P. Brief at 28.[8]

The court believes that ITA certainly must consider the purpose of the multinational rule before applying any standard for determining viability to a particular case. The statute, however, does not direct ITA to focus on worldwide profit, production, and purchasing in order to determine adequacy of home market sales, and the statute specifies no particular percentage of production for the home market as compared to total production for export as indicating a non-viable home market. In addition, ITA's use of sales as a basis for comparison in its viability test, rather than production, conforms with the purpose of the statute: to ascertain the FMV of the merchandise in order to compare it with United States *sales* price and thereby to arrive at an appropriate margin. While a test based on total production might in some case be an appropriate basis for a viability test, plaintiffs have not shown any inconsistency with the statute or unreasonableness in ITA's approach here. In addition, great discrepancies between sales and production have not been shown. See CRA Vol. I, Doc. 9 at 328A.

Although plaintiffs have not proposed any alternative test of useful specificity, for completeness the court will examine the two parts of the viability test used here by ITA. With regard to the specific percentage of sales required, it should be noted that Congress enacted the MNC provision as an anti-circumvention device to avoid the "illusion of no dumping * * * produced by comparison of the multinational corporations' prices on exports to the United States with the low prices on its exports to other foreign countries." S. Report No. 1298, 93d Cong., 2d Sess. 175, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7186, 7312. In enacting the MNC rule Congress decided that the "illusion" may exist in circumstances in which the multinational corporation makes "insignificant or no sales to its home market." *Id.* That the "illusion" might exist in circumstances which plaintiffs believe exist here is of no help if Congress has provided a stricter test which is not met.

The statutory provisions governing application of the MNC rule require ITA to look at whether home market sales are "nonexistent or inadequate" before applying the MNC rule's alternative FMV procedures. 19 U.S.C. § 1677b(2). Nonexistent means something that does "not hav[e] existence," *see Webster's Third New International Dictionary* 1537 (1981), and inadequate in this context is understood by the court to be greater than "nonexistent," but closer to nonexistent than to one hundred percent. As indicated Congress has referred to "insignificant" sales. *See* S. Report No. 1298, *supra,* at 174, 1974 U.S. Code Cong. & Admin. News at 7311. In lieu of the word "insignificant," Congress has also used the word "little." *Id.* at 175, 1974 U.S. Code Cong. & Admin. News at 7312. "Insignificant" or "little" would appear to be closer to the five percent ITA stan-

[8]It is in any case not much less than 90%. *See* CRA Vol. II, Doc, 14 at 451A.

dard or the ten percent involved here than to a substantially larger figure.

With regard to the regulation's comparison of home market sales to third country sales, it would appear possible in certain cases of heavy United States sales and minimal third country and home market sales that 19 C.F.R. § 353.4(a) might not provide an appropriate test. *See, e.g., Red Raspberries from Canada; Final Results of Antidumping Duty Administrative Review,* 54 Fed. Reg. 6,559, 6,559–60 (1989). That, however, is a factual situation not before the court.[9] In this case third country sales are the predominant group of sales, CRA Vol. II, Doc. 17 at 552A, and it would not appear unreasonable under these facts to test home market viability against such sales.[10]

The court is, however, concerned that ITA's use of language in its determination here implies that section 353.4(a) provides a hard and fast rule, even though, in other cases, ITA has viewed the rule as a guideline only. Compare *Final Determination* at 8,773–74 and *Red Raspberries From Canada, supra,* 54 Fed. Reg. at 6,559–60 (1989); *Certain Steel Wire Nails From the Republic of Korea, supra,* 45 Fed. Reg. at 34,942. *See also Remand Determination of the Investigating Authority In The Matter of Red Raspberries From Canada,* Canada-United States Panel No. USA–89–1904–01 at 3 (issued January 26, 1990) ("[i]f as a result of the specific circumstances of a case, the Department cannot accurately judge the adequacy of home market sales vis-a-vis third country sales as a basis for calculating foreign market value, the Department will test the adequacy of home market sales in an alternate manner which is consistent with the antidumping law.").

Despite the language of the determination and defendant's position before the court, the court sees no reason to remand for further consideration of statutory language and purpose. Both ITA's earlier and subsequent decisions indicate an understanding that 19 C.F.R. § 353.4 might not always provide an appropriate home market sales viability test and given the facts of this case there was no reason for ITA to explain in what situation 19 C.F.R. § 353.4 might not be used.

There is nothing to show in this case that ITA did not read the statute correctly or that it would fail to follow it in the appropriate circumstance. Nor is there a showing that ITA failed to make a rational determination in choosing to use the standard of section 353.4, even though the regulation does not directly apply to this case. Despite its arguments regarding profit, production, and purchasing patterns, plaintiffs have proposed no better standard for application to the facts of this case than the one utilized by ITA.

[9] Here, home market sales were approximately ten percent and United States sales were less than five percent of total sales.

[10] The court also rejects plaintiffs' argument that the words in 19 C.F.R. § 353.4 "other than that provided for in § 353.9" indicate that § 353.4 viability standards cannot be applied to the MNC situation. The words refer to the MNC FMV calculation not to the provisions for determining whether a special MNC rule is to be applied.

Nevertheless, the standard of section 353.4 cannot be blindly applied to every instance of possible application of the MNC rule, and ITA should exercise proper discretion in future antidumping determinations touching upon the MNC rule to ensure that it fulfills the purpose of that provision. There is sufficient indication here, however, that ITA acted properly in determining home market sales viability under the facts of this case.

D. *Adequacy Under the Standards of 19 C.F.R. § 353.4:*

The record here indicates Tosoh Hellas's home market sales of EMD were approximately 10% of both total sales and of third country sales. *See* CRA Exhibits to Verification of Sales, Doc. 5 at 503A. Plaintiffs argue, nonetheless, that even assuming application of 19 C.F.R. § 353.4, viability does not exist. They claim sales were not in the ten percent range, but rather that sales were not even at five percent of third country sales. They argue that a number of home market sales, in particular sales of zinc EMD, were at prices below cost of production (COP) and should have been disregarded.

19 U.S.C. § 1677b(b) mandates that sales made at less than COP be omitted from the FMV calculation if they are made over an extended period of time and in substantial quantities at prices which do not permit cost recovery within a reasonable period and in the normal course of trade. Home market sales might be inadequate here even under 19 C.F.R. § 353.4, if some of the zinc sales were eliminated from consideration because they were below COP. In such a case ITA might be required to turn to Japanese sales under the MNC rule, as plaintiffs claim.

1. *Production Bunching:*

The most important COP issue raised by plaintiffs is their claim that Tosch Hellas bunched production during the period of investigation (POI), thereby creating lower than normal per unit COP for EMD production. P. Brief at 38–39. Plaintiffs assert that a Tosoh Hellas brochure shows that the facility's average annual production capacity is 12,000 tons per year. P. Brief at 36. Using this number plaintiffs claim that production during the POI was unusually high and Commerce should have made appropriate adjustments. *Id.* at 36–39. The record reveals annual production to be greater than 12,000 tons. CRA Vol. I, Doc. 9 at 326A. ITA verified the higher figure and there is no reason shown in the record to reject it. Under ITA's calculations it is likely that more than fifty, but less than sixty, percent of one specific annual production figure occurred during the POI. This could be a normal variance and by itself this seems an insufficient reason for abandoning the standard POI or making other extraordinary adjustments. In fact, ITA looked at surround-

ing periods and found no large swings in production. CRA Vol. II, Doc. 27 at 650A.[11]

Furthermore, Commerce, not Tosoh Hellas, selected the POI under 19 C.F.R. § 353.38 (1988). Consequently, there is no reason to believe that Tosoh Hellas planned its production in advance to bring factory activity up and cost down during the period. Plaintiffs presumably know the manner in which the industry operates and could have requested a longer POI if they foresaw a cyclical problem with the facility's production. Even if plaintiffs had made such a request, ITA would still have had discretion under the facts at hand not to grant that request. *C.f. Monsanto, supra,* 12 CIT at ——, 698 F. Supp. at 283 (*citing Melamine Chemicals, Inc.* v. *United States,* 732 F.2d 924, 929 (Fed. Cir. 1984)). *See also* 19 C.F.R. § 353.38. *And see Kerr-McGee I* at 15–20. Overall, plaintiffs have not met its burden of showing ITA acted unreasonably in utilizing the standard six-month POI and in not making unusual adjustments under the facts of this case.

2. *Maintenance Costs:*

The next issue raised by plaintiffs concerns whether ITA properly accounted for maintenance costs during the six-month POI. There is no evidence in the record that a majority of maintenance costs are incurred in August (outside the POI) as plaintiffs allege. P. Brief at 37.[12] While the record does reflect that during the summer vacation period the plant stops operation, *see* CRA Vol. II, Doc. 14 at 451A, maintenance costs during the six-month POI were found to be more than half the amount of total maintenance for 1987 and cannot be said to be unreasonably low in relation to actual production. *See* Exhibits to Verification of Cost of Production, Exhibit 18 at 224A; CRA Vol. I, Doc. 9 at 375A & 377A. Commerce was substantially justified in accepting the verified maintenance costs.

3. *MnO Allocation:*

Plaintiffs next claim that Tosoh Hellas improperly accounted for Manganese Oxide (MnO) COP. P. Brief at 41. There is evidence in the record supporting the conclusion that MnO is, and was treated by ITA as, an intermediate product, rather than a by-product. CRA Vol. 1, Doc. 9 at 321A. *See also* CRA Vol. II, Doc. 27 at 642A–46A. A single process converts manganese ore to MnO. MnO may then be sold or may be further processed into EMD. Commerce accounted for the portion of MnO that went into EMD and allocated costs between finished MnO and EMD. *Final Determination,* 54 Fed. Reg. at 8,774. Plaintiffs' alternate methodology of calculating all plant costs toward EMD COP and subtracting out sales value of finished MnO, *i.e.* as a by-product, is not a methodology mandated by the facts of this case or ordinary accounting principles. *See* P. Brief at 42. The

[11]As sales and production were in the same range, CRA Vol. I, Doc. 9 at 328A; Exhibits to Verification of Sales, Exhibit 7 at 503A, the court sees no reason to remand to ITA to investigate further as to whether large amounts of production were inventoried or to perform any other cost adjustments.

[12]This issue has some relevance to the production bunching discussion, *supra,* at section II.D.1.

record shows that almost all costs incurred by Tosoh Hellas arose from EMD production and that very little was absorbed in the production of finished MnO and that the allocation was reasonable. CRA Vol. I, Doc. 9 at 367A–68A. Commerce was justified in accepting Tosoh Hellas's allocation methodology and the record does not support the claim that the calculations made skewed the COP analysis.

4. *General and Administrative and Other Expenses:*

Finally, plaintiffs claim that COP numbers should have been adjusted upwards to reflect revisions in sales data made by ITA following verification. P. Brief at 40–41. *See* CRA Vol. II, Doc. 33 at 919A. Revisions in sales data for price comparison purposes do not necessarily compel adjustment of cost data.

ITA accepted Tosoh Hellas's expense allocation methodology based on shipping date because it was not distortive. *See Final Determination,* 54 Fed. Reg. at 8,774. *See also* CRA Vol. 1, Doc. 9 at 326A–27A. This information was verified against the best official financial data available at the time of investigation. *See* CRA Vol. II, Doc. 27 at 675A–82A. The record supports ITA's costing of the general expenses at issue.

In general, calculations based on the rate of exchange provided by plaintiffs show, after conversion to pounds per metric ton, that both zinc and alkaline EMD were produced above the final cost of production figure. *See* CRA Vol. II, Doc. 32 at 914A. *See also* Hearing Transcript at 8–15, 27–29 & 33–34. Plaintiffs' COP arguments do not warrant rejection of ITA's home market FMV determination.

Conclusion

The court upholds ITA's decision not to apply the MNC rule in this matter. The agency followed established practice in making its finding that alkaline EMD is similar to zinc EMD and in considering "similar" merchandise in order to determine whether sales in the home market were "nonexistent or inadequate." In addition, ITA's determination of Tosoh Hellas's home market sales under standards set forth in 19 C.F.R. § 353.4 was not contrary to law under the facts of this case. Finally, ITA's findings that Tosoh Hellas's COP figures were not distorted is based on substantial evidence in the record and is in accordance with law. Accordingly, ITA's determination imposing antidumping duties in *Final Determination of Sales at Less Than Fair Value; Electrolytic Manganese Dioxide From Greece,* 54 Fed. Reg. 8,771 (1989) is sustained in its entirety.

(Slip Op. 90-62)

Bakelite Thermosets, Ltd., plaintiff *v.* United States, defendant

Court No. 87-06-00746

[Judgment for defendant.]

(Decided June 28, 1990)

Barnes, Richardson & Colburn (*James S. O'Kelly, Sandra Liss Friedman*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, (*Saul Davis*), Civil Division, United States Department of Justice and *Edward N. Maurer*, United States Customs Service for defendant.

Opinion

Restani, *Judge:* This action is before the court for decision following trial. The product at issue is an asphalt-wax emulsion which is used in making water repellant gypsum board. The product is known as Bakelite No. 52X. Customs classified No. 52X as "Mineral substances, and articles of mineral substances, not specially provided for: Other: Not decorated," under item 523.91, of the Tariff Schedules of the United States (TSUS) (1984). Plaintiff claims that the correct classification is under item 521.11, TSUS, "Asphaltum, bitumen, and limestone-rock asphalt."

The issue before the court is whether No. 52X is a form of asphalt, even though "improved," or whether it is a new article produced from combining asphalt and other ingredients.

Facts

The parties agreed in the Pretrial Order on this matter that No. 52X is a liquid, consisting of forty-five percent asphalt, forty-five percent water, eight percent petroleum wax and two percent emulsifiers and stabilizers. There appears to be agreement between the parties that the water component is irrelevant to classification. There also appears to be agreement that the emulsifiers and stabilizers do not take the product out of the "asphaltum" classification. Rather, the essential dispute is whether the eight percent wax component makes No. 52X more than or other than a form of asphalt.

The parties also agreed in the Pretrial Order that most commercially used asphalt is derived from petroleum.[1] The wax used in No. 52X is also a petroleum derivative. *See* TR 29-31. The wax is, however, more expensive by volume and weight than asphalt. TR 39-40. The parties agree that the asphalt and wax in No. 52X do not chemically combine, rather they are kept in emulsion until application. It is also undisputed that the emulsion at issue is a dispersion of fine particles in water.

[1]Naturally occurring asphalt deposits do not appear to be of relevance here.

No. 52X is mixed with gypsum slurry so that the gypsum particles are coated to make the resulting gypsum board more water repellant. Apparently, the water in the emulsion is substantially evaporated and only the asphalt and wax remain thereafter as effective components of the finished board. TR 19–20, 212–14. Gypsum board consists of a hard core sandwiched between two paper liners; it is used as structural building panelling.

Asphalt is traditionally used as both a waterproofing and an adhesive agent. TR 50–51, 92, 175–76. It is apparent that the adhesive function aids the waterproofing function. Testimony revealed that neither wax nor asphalt alone efficiently or sufficiently waterproofs the gypsum board for commercial purposes. *See* TR 15–18, 158–59, 196–98, 257–60.[2] *See also* Plaintiff's Exhibit 4, United States Patent No. 2,432,963, column 2, lines 22–27. ("The degree of water resistence * * * is very much greater than that obtained when one uses either wax alone or the asphalt alone in emulsified form.") Although there was a lack of clarity as to the exact mechanical functioning of the asphalt and wax in No. 52X, the totality of the testimony and documentary evidence indicates that while the asphalt is important in waterproofing the gypsum particles, the wax also aids this process. Together the wax and asphalt waterproof the gypsum particles. *See id.* column 5 at lines 41–52; TR 92, 115, 213–17, 258–60. Therefore, the court finds based on the evidence presented by both parties that the wax performs an important permanent function in the waterproofing of the gypsum board and does not merely aid application of the asphalt particles to the gypsum as would an emulsifier.

There was testimony as to whether the wax should be considered a natural part of the asphalt. Apparently, asphalt does contain wax, and some asphalts may be so naturally waxy as, at least theoretically, to be capable of functioning as No. 52X does. TR 158–62. Apparently, Bakelite does not use such waxy asphalts or does not test for wax content. TR 47–48. Accordingly, wax is always added. TR 48. The eight percent wax in No. 52X, thus, is not a natural part of the asphalt used in No. 52X. TR 48–49. As indicated, the wax added to make No. 52X is of considerable value apart from the asphalt. It should be considered a separate petroleum product, not a naturally occurring part of the asphalt used in No. 52X.

There was also a great deal of testimony as to scientific and industry definitions of the term "asphalt emulsion." The term "asphalt emulsion" as used in everyday parlance in the industry seems to include almost any emulsion that is largely composed of asphalt. TR 250–52. Other definitions would seem to be more narrow. For example, *McGraw-Hill Dictionary of Scientific and Technical Terms* (3rd ed. 1984) (Defendant's Exhibit C (Def. Ex.)) defines asphalt emulsion as "[a]sphalt cement in water containing a small

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[2]Testimony that use of enough asphalt will sufficiently waterproof the board (TR 21) is not particularly helpful to resolution of this matter, as it was not shown that this is a commercially useful option.

amount of emulsifying agent." *Id.* at 112. The definition in *Introduction to Asphalt* (4th ed., 1962) (Def. Ex A), published by the Asphalt Institute does not differ significantly.[3] Bakelite's product information sheet does not describe No. 52X as simply an asphalt emulsion. *See* Plaintiff's Exhibit 1. No. 52X is described therein as a "[s]pecially designed emulsion of blended asphalt and wax * * *." *Id.*

It appears that any asphalt emulsion composed only of asphalt, water and small amounts of emulsifying agents would, for tariff purposes, fit within defendant's view of "asphaltum." The problem is that other emulsions, perhaps commonly referred to by the trade as "asphalt emulsions," contain additional components with specific permanent functions. TR 226–34. The emulsion at issue here is one such emulsion.

Discussion

Two cases involving similar products have been cited by the parties. The first is *United States* v. *Central Westrumite Co.*, 1 Ct. Cust. App. 400 (1911). The merchandise at issue in that case was a liquid form of asphalt which was "used a a binder for holding together rocks, gravel, and similar substances in the making of bitumen pavements." *Id.* at 401. Six percent of the merchandise was other than asphalt or water. *Id.* The additional chemicals were stated to evaporate as the asphalt hardened. *Id.* at 402. The court stated that "the chemicals and water are added solely for the purpose of combining the different classes of asphalt and bitumen and bringing them into that united form and condition that they may be as such readily applied and used as a binder of rocks, gravel, and other materials in the construction of asphalt or bitumen pavements * * *." *Id.* The court concluded that "the sole use of the imported merchandise is as an asphaltum and bitumen * * *." *Id.* at 403. As such the product was found to be asphalt advanced in condition. *Id.*

Central Westrumite is distinguishable from the case at hand because of the presence of wax in the product before the court. The wax does not simply aid combination and application as did the "chemicals" in *Central Westrumite*, or as do emulsifiers in the asphalt emulsions readily accepted as advanced forms of asphalt.

The view that emulsifiers simply enhance the asphalt product is supported by *American Bitumuls & Asphalt Co.* v. *United States*, 45 Cust. Ct. 1, C.D. 2188, 185 F. Supp. 955 (1960). In that case the court found that asphalt mixed with twenty percent petroleum distillate (a so-called "cutback") was a form of asphalt. 45 Cust. Ct. at 4, 185 F. Supp. at 957–58. Like emulsifiers, the distillate or solvent was used to maintain the liquid form of the product. *Id.* The court recognizes a distinction between emulsifiers and distillates which aid ap-

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[3]Contrary to plaintiff's contention, the Asphalt Institute's *A Basic Asphalt Emulsion Manual* (2nd ed. n.d.) (Def. Ex. F) does not conflict with this definition.

plication, combination, or transportation on one hand, and components with additional permanent functions, such as wax.

Of slightly more recent vintage than *Central Westrumite* is *Mariemont Co.* v. *United States,* T.D. 45,573, 61 Treas. Dec. 776 (1932). The product at issue in that case was asphalt in a liquid form, apparently an emulsion. The emulsion contained twenty percent "sodium soap." *Id.* at 780. The court made no mention in the discussion portion of the opinion of the sodium soap. It merely concluded that "the asphaltum is in a chemically unchanged state." *Id.* at 784. The product apparently was used, as asphalt is commonly, for making roads. *Id.* at 779. All evidence indicated that the government's original opinion that merchandise was "sulphonated bituminous pitch," which was not a paving material, was incorrect. *See id.* at 777. The court did not accept the government's argument that the presence of the sodium soap indicated an asphalt manufactured into something else. *See id.* at 780. Whether the sodium soap is an emulsifying agent or had other purposes was not explained. Evidence in this case, however, indicates that soaps were used as emulsifying agents in earlier asphalt products, *see A Basic Asphalt Emulsion Manual, supra,* at 11, and the *Mariemont* court treats the product at issue there as if the sodium soap is merely an enhancement of the asphalt product. *See Mariemont,* 61 Treas. Dec. at 784.

The clear similarity between *Mariemont* and the case at hand lies in the lack of chemical change to the asphalt and the presence of additional non-asphalt or water components. Because the sodium soap function is not discussed, it is difficult to apply the reasoning of *Mariemont* to the facts now before the court. *Mariemont,* however, cannot stand simply for the proposition that whenever no chemical change occurs in an asphalt containing emulsion, only a form of asphalt is present. Obviously, a product could be largely something other than asphalt without the asphalt component being chemically changed. *Mariemont* rather appears to be a case that states: it's not what the government thinks it is; and it looks, acts, and is used as asphalt is, therefore, it is asphalt. Thus, *Mariemont* is not particularly helpful to understanding the classification of asphalt-containing emulsions used in technically advanced applications.

Plaintiff relies, *inter alia,* on *Adolphe Hurst & Co., Inc.* v. *United States,* 33 CCPA 96, C.A.D. 322 (1946) to support its view that only a form of asphalt is at issue. *Hurst* dealt with improved, rather than "natural" or "crude," waxes. *Id.* at 100–03. The products at issue there contained more than natural wax, but were still marketed as "wax." *Id.* at 100–01. The court ruled that Congress did not limit the term "wax" to crude waxes only *Id.* at 103. Obviously, the *Hurst* case allows the classification of advanced forms of products under broad *eo nomine* provisions. The court does not read *Hurst* to mandate classification according to the chief component of a product, here asphalt. The product at issue here is not asphalt, while the product at issue in *Hurst* was wax. Applicable definitions, plaintiff's

own marketing, and simple chemical analysis indicate the product at issue is not merely a form of asphalt.

Although the opposite result obtained from a different set of facts, the reasoning of *Central Westrumite* provides the best guidance for resolution of this matter. That reasoning is also consistent with the various definitions submitted by the parties and the marketing of this product. The product at issue is more than a simple asphalt emulsion consisting of asphalt, water and emulsifiers which aid application of the asphalt. The product at issue is an asphalt-wax product with both the asphalt and wax performing important permanent functions in the end use of the product. Accordingly, the court finds that plaintiff has not overcome the presumption of correctness applicable to defendant's classification and that defendant's view that the product is not simply an improved or advanced form of asphalt is sustained.

(Slip Op. 90-63)

HALPERIN SHIPPING CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 87-02-00371

[Defendant's motion to dismiss is granted.]

(Dated July 2, 1990)

Serko & Simon, (*Joel K. Simon, David Serko* and *Leibert L. Greenberg*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office (*Al J. Daniel, Jr.*) for defendant.

OPINION

CARMAN, *Judge:* This action is before the Court on motion of the defendant United States (hereinafter the government) to dismiss this action for lack of jurisdiction and failure to state a claim upon which relief can be granted pursuant to USCIT Rule 12. The government claims this Court lacks jurisdiction because plaintiff Halperin Shipping Co., Inc. (hereinafter Halperin) failed to timely file a protest under section 514 of the Tariff Act of 1930 as amended, 19 U.S.C. § 1514 (hereinafter section 1514), thereby failing to meet the jurisdictional requirements of 28 U.S.C. § 1581(a). For the reasons that follow, this Court determines that it lacks subject matter jurisdiction and must dismiss this action. Accordingly, the Court will not address the government's other claims.

BACKGROUND

Halperin initiated this action pursuant to 28 U.S.C. § 1581(a) to recover Customs duties it allegedly paid twice to the United States Customs Service (hereinafter Customs) for the importation of a single entry of gold necklaces entered at the port of JFK New York on August 14, 1980. The estimated duty on this entry was $9,141.47. Neither Halperin nor anyone else timely filed an entry summary or paid the estimated duty. In its amended complaint Halperin claims it originally paid the duties at issue to its licensed customhouse broker, Saar Systems Inc. (hereinafter Saar), for remittance to Customs. Apparently Saar stole the monies and never remitted them to Customs.

Nearly two years later, on June 18, 1982, Customs sent Halperin a "Notice of Liquidated Damages Incurred and Demand For Payment" (hereinafter Notice of Liquidated Damages).[1] The notice demanded that Halperin, as importer of record, pay $9,141.47 to the government for the estimated duties due and $90,039.47 in liquidated damages for failure to file the entry summary and estimated duties. Halperin neither filed a protest nor petitioned for remission or mitigation of the penalties pursuant to 19 U.S.C. § 1618 at this time.

Subsequent to the June 18, 1982 notice, Halperin and the government engaged in lengthy negotiations towards settling the government's claims on the entry at issue in this case and twenty-seven other entries for which Halperin was delinquent in paying duties.[2] On March 31, 1983, after considerable negotiation, offers of settlement and counter offers, the then Assistant Secretary of the Treasury John M. Walker, Jr.[3] notified Halperin by letter of the government's final offer of settlement and compromise. *See* Defendant's Original Brief, Exhibit L. The letter provided clear notice that the government would institute suit within the week if payment were not received forthwith.[4]

On April 18, 1983 Halperin made another offer of settlement to the Regional Commissioner of Customs and tendered payment of the $219,586.00 Halperin seeks to recover in this case. *See* Memo-

[1]At approximately the same time Customs also sent Halperin similar demands for payment relating to some 27 other entries for which duties were due. *See* Memorandum in Support of Defendant's Motion to Dismiss (hereinafter Defendant's Original Brief), Exhibit B.

[2]The subject of this action, Entry No. 80–774767–6, is one of 28 entries for which the government sought estimated duties due and liquidated damages from Halperin totaling nearly $4,000,000. At least some of the other entries not before the Court in this particular case appear to have been contested in separate actions suspended under this case. *See e.g., Halperin Shipping Co., Inc.* v. *United States*, Court Nos 88–06–00412 (involving seven entries) and 89–08–00481 (involving two entries). Inexplicably, in this action Halperin's amended complaint seeks to recover the entire $219,586.00 it paid in settlement of all 28 cases.

[3]Mr. Walker is currently a judge of the United States Court of Appeals for the Second Circuit.

[4]The Walker letter stated in pertinent part as follows:

> Upon a review of the entire matter and, in particular, the company's current financial condition, I can find neither the requisite litigation risk, nor the inability of Halperin to pay the duties which would support consideration of a compromise. Rather, I support Commissioner von Raab's offer to accept payment of the debt over a three-year period at 14.2% interest as an extremely equitable balancing of the interests of both the Government and Halperin Shipping Company, Inc.
>
> I have been informed that the Justice Department will be filing a suit within the week if payment is not received or the installment arrangement is not concluded.

Defendant's Original Motion to Dismiss, Exhibit L.

randum in Support of Defendant's Renewed Motion to Dismiss (hereinafter Renewed Motion to Dismiss Brief), Exhibit A. Customs accepted this offer and negotiated the checks. *Id.*, Minsky Declaration ¶¶ 8 and 9; Defendant's Original Brief, Exhibit N. Thereafter, Customs closed its files on the case without bringing an action against Halperin.

On June 8, 1983 Halperin filed a purported protest which it asserts is a proper predicate for this Court to exercise jurisdiction. Halperin's "protest" referred to Assistant Secretary Walker's March 31, 1983 letter as a "demand for payment" from which Halperin was aggrieved. *See* Court File (entry papers). Customs denied the protest on January 30, 1987, declaring the issue was not protestable under section 1514. *Id.*

Thereafter, Halperin filed suit in this Court seeking return of the alleged duplicate payment of duties to Customs. Halperin claimed that Saar was an agent of the government and that Customs' negligence in failing to timely notify Halperin that duties were owed on the imports resulted in the so-called duplicate payment of the duties and that Halperin was entitled to a refund of the alleged excess payment of duties. Before issue was joined, the government moved to dismiss this action on grounds substantially similar to the motion now before the Court. In *Halperin Shipping Co., Inc.* v. *United States*, 13 CIT ——, Slip Op. 89–78 (June 6, 1989), this Court denied the motion to dismiss with leave to renew. After the government filed its answer and discovery had been initiated, the government filed its renewed motion to dismiss.

Contentions of the Parties

The government contends that this Court lacks subject matter jurisdiction over this action due to Halperin's failure to file a timely protest of the June 18, 1982 Notice of Liquidated Damages that demanded payment of estimated duties and liquidated damages. The government notes that under section 1514 of title 19 of the United States Code decisions of Customs officials are final and conclusive unless a protest is filed within ninety days of the protestable decision. In order to obtain jurisdiction in this Court the government argues Halperin would have had to file a protest within ninety days of the June 18, 1982 Notice of Liquidated Damages. Halperin's alleged protest, filed on June 8, 1983, fell outside this jurisdictional time limit. Furthermore, the government argues that the March 31, 1983 letter from Assistant Secretary Walker was not a protestable decision, thus Halperin's alleged protest filed within ninety days of the Walker letter did not give rise to jurisdiction in this Court.

Halperin opposes this motion contending that the decision of this Court denying the government's original motion to dismiss operates to bar the current motion by virtue of the law of the case and *stare decisis*. Additionally, Halperin contends the government mischaracterizes its action as one for liquidated damages when in actu-

ality it is an action to recover a duplicate payment of duties. Halperin claims it properly protested Assistant Secretary Walker's March 31, 1983 letter, pursuant to 19 U.S.C. § 1514(a)(3), which provides for protest of "all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury." Halperin claims the Walker letter was "an actual assessment of a specific sum of money," a protestable decision, from which Halperin timely filed a protest. *See* Plaintiff's Memorandum in Opposition to Defendant's [First] Motion to Dismiss at 6–7 (incorporated by reference in Plaintiff's Memorandum in Opposition to Defendant's Second Motion to Dismiss).

Discussion

As a preliminary matter the Court notes that contrary to Halperin's assertions neither law of the case nor *stare decisis* operate to preclude this Court from assessing its subject matter jurisdiction. Subject matter jurisdiction cannot be waived by the parties or this Court and can be raised at any time. *Capron* v. *Van Noorden,* 2 Cranch (6 U.S.) 126 (1804); *Morganroth* v. *Quigg,* 885 F.2d 843, 845 (1989) (court raised issue *sua sponte*). Moreover, it is well settled that when a jurisdictional issue is raised, plaintiff has the burden to prove that jurisdiction exists. *See e.g., Hambro Automotive Corp.* v. *United States,* 66 CCPA 113, 117, C.A.D. 1231, 603 F.2d 850, 853 (1979); *Lowa, Ltd.* v. *United States,* 5 CIT 81, 83, 561 F. Supp. 441, 443 (1983), *aff'd,* 2 Fed. Cir. (T) 27, 724 F.2d 121 (1984).

Halperin predicates jurisdiction in this Court under 28 U.S.C. § 1581(a)[5] and 19 U.S.C. § 1514,[6] which provide that the filing of a valid protest of an action of the Customs Service, within ninety days from its date, is a condition precedent to the establishment of jurisdiction in this Court. Halperin contends the Walker letter was a protestable decision for purposes of jurisdiction in this Court. An examination of the statutory scheme and the facts of this case lead this Court to conclude the Walker letter was not a protestable decision.

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[5] 28 U.S.C. § 1581(a) (1988) provides as follows:

> (a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

[6] 19 U.S.C. § 1514(a) and (c)(2) (1982 & Supp. V 1987) (emphasis added) provides in pertinent part:

> (a) * * * decisions of the appropriate customs officer, including the legality of all orders and findings entering into the same, as to—
>
> * * * * * * *
>
> (2) the classification and rate and amount of duties chargeable;
>
> (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
>
> * * * * * * *
>
> (5) the liquidation or reliquidation of an entry, or any modification thereof;
>
> * * * * * * *
>
> *shall be final and conclusive* upon all persons (including the United States and any officer thereof) *unless a protest is filed* in accordance with this section, or unless a civil action contesting the denial of a *protest,* in whole or in part, is commenced in the United States Court of International Trade * * *.
>
> * * * * * * *
>
> [(c)] (2) A protest of a decision, order, or finding * * * shall be filed with such customs officer within *ninety days* after but not before—
>
> (A) notice of liquidation or reliquidation, or
>
> (B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made.

It is uncontroverted that Halperin did not file a protest within ninety days of the government's Notice of Liquidated Damages dated June 18, 1982. Nevertheless, contrary to the government's contention, the June 18, 1982 Notice of Liquidated Damages was not a protestable decision. This argument has been squarely rejected by the Court of Appeals for the Federal Circuit, which has held that "an assessment of liquidated damages is not a 'charge or exaction' that must be challenged by protest under 19 U.S.C. § 1514 * * *." *United States* v. *Toshoku America, Inc.*, 879 F.2d 815, 818 (Fed. Cir. 1989) (construing *United States* v. *Utex Int'l, Inc.*, 6 Fed. Cir. (T) 166, 857 F.2d 1408 (1988)). Since the June 11, 1982 Notice of Liquidated Damages was not a protestable decision it did not start the ninety day filing deadline and the fact that Halperin did not protest the Notice of Liquidated Damages does not deprive this Court of jurisdiction. However, since Halperin's alleged protest, dated June 8, 1983, was clearly filed within ninety days of the March 31, 1983 Walker letter, well within the time limitation of 19 U.S.C. § 1514(c)(2), this Court must decide whether the Walker letter constituted a protestable "charge or exaction" for purposes of establishing jurisdiction in this Court.

As the importer of record in this case, Halperin was obligated to pay the estimated duties upon entry of the merchandise. *See* 19 U.S.C. § 1505(a) (1982) and 19 C.F.R. § 141.1(b) (1980). Apparently, the first time Halperin learned the duties had not been paid on the entry in this case was when it received the June 18, 1982 Notice of Liquidated Damages from Customs demanding payment of estimated duties and liquidated damages. The Notice of Liquidated Damages specified the amount claimed due and owing, the entry number at issue, the importer number, the port of entry and the date of the demand, and clearly notified Halperin that it could petition Customs for remission or mitigation of the claim within sixty days.

Upon receipt of the notice demanding payment of estimated duties and liquidated damages, any right Halperin had to contest the amount of duties due or any other matters relating to the liquidation of the merchandise at issue had expired when the items were liquidated, or as appears the case here, deemed liquidated by statute, and the time to protest had lapsed. *See* 19 U.S.C. § 1504 (1982); *Utex Int'l, Inc.*, 6 Fed. Cir. (T) at 168, 174, 857 F.2d at 1410, 1414 (all findings by Customs officials merge in the liquidation); *Ambassador Div. of Florsheim Shoe* v. *United States*, 3 Fed. Cir. (T) 28, 30, 748 F.2d 1560, 1562 (1984); *Hambro Automotive Corp.*, 66 CCPA at 117–18, 603 F.2d at 853. Halperin is thus precluded from contesting the amount of estimated duties it paid.

As concerns the demand for liquidated damages, Halperin could have petitioned Customs for remission or mitigation of the penalties demanded by Customs pursuant to 19 U.S.C. § 1618. Instead, Halperin chose to negotiate with Customs in order to settle the gov-

ernment's claims regarding all twenty-eight entries for the duties which had not been paid by Saar, its customhouse broker.

As the documents and affidavits make clear, the March 31, 1983 Walker letter was the culmination of long series of voluntary settlement negotiations entered into by Halperin to diminish its liability on the outstanding claims. The Walker letter was not a "charge" or "exaction" within the meaning of section 1514, *inter alia* because it did not assess a specific sum of money relating to specific entries of merchandise, *Alberta Gas Chemicals, Inc.* v. *Blumenthal,* 82 Cust Ct. 77, 81–82, C.D. 4792, 467 F. Supp. 1245, 1249–50 (1979) (and citations therein), and because Halperin was under no compulsion to tender any settlement payments to the government on account of the letter. *ITT Semiconductors* v. *United States,* 6 CIT 231, 234–37, 576 F. Supp. 641, 643–46 (1983) (settlement decision is not protestable) (citing *Carlingswitch, Inc.* v. *United States,* 85 Cust. Ct. 63, C.D. 4873, 500 F. Supp. 223 (1980), *aff'd,* 68 CCPA 49, C.A.D. 1264, 651 F.2d 768 (1981)). As Halperin was fully aware, it was always free to opt out of the settlement negotiations and await judicial resolution of claims in a suit initiated by the government.[7]

In short, the Walker letter was not a protestable decision within the meaning of section 1514. As a result, Halperin's June 8, 1983 "protest" was no protest at all and incapable of satisfying the jurisdictional requirements for suit in this Court.

Halperin's characterization of its cause of action as one for a refund of a duplicate payment of duties does not alter the requirement that it file a valid and timely protest as a condition precedent to jurisdiction in this Court pursuant to section 1514. *ITT Semiconductors,* 6 CIT 231, 576 F. Supp. 641; *Hambro Automotive Corp.,* 66 CCPA at 117, 603 F.2d at 853; *Peerless Ins. Co.* v. *United States,* 12 CIT ——, ——, 703 F. Supp. 104, 106 (1988); *San Francisco Newspaper Printing Co.* v. *United States,* 9 CIT 517, 620 F. Supp. 738 (1985); *Star Sales & Distrib. Corp.* v. *United States,* 10 CIT 709, 710, 663 F. Supp. 1127, 1128 (1986) (and citations therein). Considerations of sovereign immunity mandate that the United States only be subject to suit when the statutorily defined terms of its consent have been duly met. *United States* v. *Boe,* 64 CCPA 11, 15–16, C.A.D. 1177, 543 F.2d 151, 154–55, (1976). Those requirements will be strictly construed and this Court has no power to relax the statutory preconditions for waiver of sovereign immunity or to apply equitable principles to expand this Court's jurisdiction. *Id.* at 16, 543 F.2d at 155; *Georgetown Steel Corp.* v. *United States,* 4 Fed. Cir. (T) 143, 147, 801 F.2d 1308, 1312 (1986); *NEC Corp.* v. *United States,* 5 Fed. Cir (T) 49, 51, 806 F.2d 247, 249 (1986) (and citations therein). The absence of a

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[7] A letter from Halperin's counsel to Customs exhibits the voluntariness of Halperin's settlement negotiations and payments. The letter stated that "[a]s we all recognize, the alternative to a compromise in this situation is protracted litigation which will be of little benefit to either party." Defendant's Original Brief, Exhibit J at 2 (letter from law firm Serko & Simon to Customs' Regional Commissioner Dennis T. Snyder). Furthermore, it cannot be gainsaid that Halperin reaped substantial benefit from its participation in the settlement negotiations since at their conclusion Halperin paid considerably less than the government's original penalty claims, which totaled nearly $4 million.

valid protest is fatal to the maintenance of jurisdiction in this Court.

While this Court sympathizes with Halperin because it was apparently the victim of a thief, its customhouse broker, Halperin chose its customhouses broker, the government did not. Halperin's remedy is against the thief, not the government.

Conclusion

Based upon the foregoing reasoning this Court concludes that Halperin has failed to properly invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1581(a) and 19 U.S.C. § 1514. Accordingly, this action is dismissed.

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C90/186 6/20/90 Re, C.J.	Eastern Coated Papers, Inc.	88-8-00594	254.56 Various rates	723.32 Various rates	Agreed statement of facts	Ogdensburo Paper

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